

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS AND JOINT APPENDIX

**IN THE
United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,014

SAMUEL SPENCER, ET AL., *Appellants,*

v.

ALBERT I. BULLOCK, *Appellee.*

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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QUESTIONS PRESENTED

A member of the Metropolitan Police Department, having filed an application for retirement from the Police Department on the basis of age and longevity, and before said application was acted upon having been found guilty by a police trial board of three grave charges of misconduct and having been dismissed from the Metropolitan Police Department, the questions presented are

1. Whether the District Court erred in holding that said former member after being so dismissed has an indefeasible right to receive retirement compensation.

2. Whether the District Court erred in granting a mandatory injunction to compel the Commissioners of the District of Columbia to pay such dismissed former member the retirement compensation which retired members of the Police Department receive.

IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,014

SAMUEL SPENCER, RENAH F. CAMALIER, LOUIS W. PRENTISS,
Board of Commissioners, District of Columbia, and
ROBERT V. MURRAY, Chief of Police, Metropolitan Police
Department, *Appellants*,

v.

ALBERT I. BULLOCK, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS AND JOINT APPENDIX

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JURISDICTIONAL STATEMENT

On October 9, 1953, the District Court entered judgment for the appellee (App. 35). On October 14, 1953, appellants, defendants below, filed a notice of appeal. This Court has jurisdiction under Title 28, U. S. Code (Revised), Sec. 1291.

STATEMENT OF THE CASE

Appellee, plaintiff below, (hereinafter referred to as "Bullock") filed a complaint, in two counts, for a mandatory injunction "directing restoration to duty of police officer and directing action on request for retirement" (App. 1). In count one, Bullock alleged that he was appointed a member of the Metropolitan Police force of the District of Columbia on August 17, 1921, and served as a member thereof continuously from that date until October 23, 1951, at which time he was suspended from duty without pay (App. 1, 2); that on January 29, 1952, he was restored to duty by appellant Murray, Chief of Metropolitan Police, with the advice and approval of the Board of Commissioners of the District of Columbia, and that he continued on duty until May 23, 1952, when he was suspended by appellants, defendants below, and that said suspension had continued to the date of the filing of the complaint; that on April 13, 1953, Bullock, by written communication addressed to appellant Murray, requested said Murray to remove Bullock from suspension, and that said Murray, along with the other appellants, had failed and refused to remove him from suspension; and that said refusal so to do was arbitrary, capricious, and without authority of law, and in derogation of his legal rights; and that he had no remedy available other than

that requested (App. 2). Bullock prayed (1) that the court below issue a preliminary injunction directing appellants to remove him forthwith from suspension in the Police Department and to restore him to duty in the Department, and (2) that the court issue a permanent injunction directing appellants to remove him forthwith from suspension in the Police Department and to restore him to duty in the Department (App. 2).

In count two, Bullock alleged that he was born February 11, 1897, and was appointed to the Metropolitan Police Department on August 17, 1921, and had been a member of the Department since that date (App. 2, 3); that on February 11, 1952, he became eligible for voluntary retirement by virtue of Sec. 4-508 of the District of Columbia Code, since he had served for more than 25 years on the police force and had attained the age of 55 years; that on February 11, 1952 he transmitted to appellant Murray a written request for retirement pursuant to the provisions of said Sec. 4-508, but that Murray and the other appellants had failed and refused to act on his request; that on March 5, 1952, he repeated his request to appellant Murray, and that Murray and the other appellants again failed and refused to act on his request; that on April 13, 1953 he again repeated his request for retirement to appellant Murray, and that Murray and the other appellants again failed and refused to act on his request; that said failure and refusal on the part of appellants to act on his election and request for voluntary retirement, as provided by law, was arbitrary, capricious and in violation of law and in complete derogation of his rights; and that he had no remedy available to him other than that requested in his complaint (App. 3). Bullock prayed that the court below issue a preliminary and a permanent injunction directing appellants to forthwith take appropriate action in effecting his retirement in accordance with his election and request, and to award to him such retirement compensation from the policemen and firemen's relief fund as he was entitled to under the law (App. 3, 4).

Appellants filed a motion to dismiss the complaint, or, in the alternative, for summary judgment upon the grounds (1) that it failed to state a claim against appellants upon which relief could be granted and, in the alternative, (2) that there was no genuine issue as to any material fact and that appellants were entitled to judgment as a matter of law (App. 5, 6). Attached to the appellants' aforesaid motion were three exhibits, designated "A", "B" and "C".

Exhibit "A" was an affidavit of the Chief of Police in which he stated the reasons why Bullock had been suspended and not restored to duty. They are as follows:

(a) That Bullock failed to explain and reveal sources of his income to the Sub-committee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia (App. 5). In explanation, Murray stated that in January 1952 hearings were held by the Sub-committee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia; that Bullock was one of the members of the Metropolitan police force, D. C., who was called upon to give testimony before that Sub-committee as to his sources of income; that Bullock attended the hearings and was interrogated by members of the Sub-committee but failed to explain or reveal the sources of his income, although he was given every opportunity by the members of the Sub-committee to do so; that during all this period of time Bullock was under suspension because, prior to the hearings, he was indicted in the United States District Court for the District of Columbia; that on January 29, 1952, upon Bullock's motion, the District Court, at trial, granted a directed verdict of acquittal (App. 5, 6); and that Bullock was tentatively restored to duty at 4:00 P.M., January 29, 1952 (App. 6).

(b) That Bullock failed to explain to Murray the sources of his income over and above his salary.

In further explanation, Murray stated, in his affidavit, in substance, as follows:

That the Board of Commissioners, D. C., had requested the Bar Association of the District of Columbia to appoint a committee of members to study the testimony of Bullock before the Grand Jury; that on February 11, 1952, Bullock submitted an application to be retired from the Metropolitan Police Department to be effective at the earliest possible date; that on February 13, 1952, the application of Bullock for retirement was forwarded to the Board of Commissioners, D. C., but that he, Murray, made the recommendation that no action be taken upon the application until such time as a recommendation was received by the Board of Commissioners from the Bar Association which was studying the testimony given before the grand jury by Bullock; that on March 5, 1952, Bullock again applied for retirement (App. 6).

That upon receiving the testimony given by Bullock before the Senate Crime Committee he, Murray, made a study of the testimony, completed the same at about 3 P.M. on May 23, 1952, and immediately called upon Bullock for an explanation of the sources of his unexplained income as brought out in his testimony; that Bullock informed Murray that he was unable at that time to give an explanation but that his attorney had retained the services of a certified public accountant to go over his deposits and withdrawals from his bank account; that, after having given Bullock every reasonable opportunity to explain the sources of his income, which he failed to do, Murray suspended Bullock from duty at 4:10 P.M. on Friday, May 23, 1952 (App. 6, 7); that on April 10, 1953, he, Murray, was informed by the United States Attorney that the Grand Jury considering the testimony of Bullock given before the Senate Crime Committee had completed its inquiry, and that no criminal indictment was returned against Bullock (App. 6).

That on April 13, 1953, Bullock, while still in a suspended status, delivered to the office of the Chief of Police a letter requesting the immediate removal of his, Bullock's, suspension from duty as

a member of the Police Department and again made application for an immediate retirement; that Bullock was informed that an explanation of the sources of his income over and above his salary must be made, both to the Metropolitan Police Department and to the public, and that until such time as such explanation was forthcoming he would remain suspended (App. 7); that he, Murray, had been advised by District income tax authorities that, in accordance with the facts and circumstances mentioned in Exhibit "C" (the affidavit of Richard S. Morgan, whose office was then conducting an investigation concerning Bullock) preliminarily, that investigation revealed a failure on the part of Bullock, to file District income tax returns for the years 1946, 1947 and 1948, and that a study was being made to determine whether Bullock had reported all income received during years for which he had filed the returns (App. 7); that he, Murray, had communicated the foregoing reasons to the Commissioners of the District of Columbia who authorized him to say that they unanimously concurred in the reasons set forth respecting the suspension of Bullock and the refusal to restore him to duty (App. 7); that he, Murray, had repeatedly stated to Bullock that he must explain the sources of his income over and above the salary he received as an official of the Police Department; that Bullock was obligated both to the Police Department and to the public to make such an explanation, and that his suspension would be continued in force and effect until such satisfactory explanation was made or until the matter was referred to the Police Trial Board for appropriate action (App. 7, 8).

Exhibit "B", attached to the motion to dismiss the complaint, etc., consisted of a memorandum order of the Metropolitan Police Department dated January 27, 1948, directed to all members, calling attention to an order of the Commissioners of the District of Columbia dated January 16, 1948, which provided, in substance, that after the latter date all

members of the Metropolitan Police Department, *inter alia*, who are applicants for retirement under the provisions of Sec. 4-508 D. C. Code, 1940, "shall in each and every such case appear before the Police and Firemen's Retiring and Relief Board for consideration of all matters pertinent to their retirement." (App. 8, 9).

Exhibit "C" was the affidavit of Richard S. Morgan, which affidavit was referred to in the affidavit of Murray (App. 9, 10).

Subsequent to the filing of the motion to dismiss, etc., Murray filed a supplemental affidavit (App. 10), which, he stated therein, was "in supplement to and by way of clarification" of the affidavit attached to the motion to dismiss or for summary judgment. In his supplemental affidavit, Murray stated that Bullock's testimony before the Senate Sub-committee was given on May 21, 1952 (App. 10, 11); that Bullock attended these hearings and was interrogated by members of the Sub-committee and its counsel but failed to explain or reveal the sources of his income over and above his Police Department salary although he was given every opportunity to do so; that Bullock had been tentatively restored to duty on January 29, 1952, the same day that the District Court directed a verdict of acquittal as to Bullock in a prosecution for conspiracy entitled *United States v. Nelson, et al.*; and that he was in such status on May 21, 1952 (the day he commenced testifying before the Sub-committee) and that on May 23, 1952, after he, Murray, had reviewed the testimony of Bullock before the Sub-committee, for the reasons set forth in his original affidavit, he suspended Bullock (App. 10, 11).

Thereafter Bullock filed a motion to strike or suppress all or portions of Murray's affidavit and supplemental affidavit. The stated ground for the motion was that the testimony of Bullock before the Senate Sub-committee and all reference in said affidavits pertaining to the contents of a questionnaire submitted by Bullock under compulsion to

said Sub-committee were immune from use as evidence (App. 11).

In opposition to the affidavit of Murray, Bullock filed an affidavit dated April 21, 1953. In it Bullock denied that he failed to explain and reveal the sources of his income to the Sub-committee and stated that in response to a subpoena he personally appeared before the Sub-committee on May 21, 1952 and May 22, 1952, and, in reply to extensive questions, answered substantially all of said questions propounded to him to the best of his knowledge and ability "as of that time", and did, to the best of his ability "as of that time" explain and reveal the sources of his income; that on February 12, 1952, a committee from the Bar Association was appointed by the Commissioners of the District of Columbia to make a study of his testimony before the Grand Jury which had returned an indictment against him and upon which indictment he was acquitted by direction of the District Court; that on February 21, 1952, a petition was filed in the District Court on behalf of the Commissioners and/or their representatives, the aforesaid Bar Association Committee, requesting disclosure of his testimony before the Grand Jury; that on March 11, 1952, in a memorandum opinion and order, the District Court directed the official stenographer and the United States Attorney to make Bullock's testimony before the Grand Jury available to the Commissioners and the Bar Association Committee; that said Bar Association Committee made its report on March 20, 1952, that the Commissioners and/or Murray had had the report since that time, a period of more than one year (App. 12, 13); that on February 11, 1952, and on March 5, 1952, he, Bullock, transmitted to Murray his, Bullock's, requests for retirement; that from January 29, 1952, to May 23, 1952, he, Bullock, was not in a suspended status but was in good standing as Inspector of the Metropolitan Police Department; that it was during this period that he made both applications for retirement; that during said

period there were no charges of any nature pending against him and he was eligible and qualified in every respect for retirement; that during a period of the preceding seven months a Grand Jury investigated his, Bullock's, testimony before the Senate Sub-committee for the purpose of determining if there was any evidence that he had committed perjury in said testimony, and that the Grand Jury officially reported that there was no such evidence; that after more than one year had elapsed since the report of the Bar Association Committee, and after the Grand Jury exonerated him as aforesaid, on April 13, 1953, through proper channels he made application for both restoration to duty and for retirement; and that since the date of his indictment in October 1951, up to and including the date of his affidavit (April 28, 1953—Tr. 94) he had never been charged with any offense in violation of any law, rule or regulation of the United States, the District of Columbia or the Metropolitan Police Department, and that he had received no pay during that period of time other than for the period January 29, 1952 to May 22, 1952 (App. 13, 14).

An affidavit of the Deputy Budget Officer of the District of Columbia was filed, wherein it was stated that the official records of the District of Columbia showed that the total amount expended during the fiscal year 1952 for the retirement of policemen and firemen was \$3,559,420.00; that the amount of retirement deductions from policemen's and firemen's salaries during that fiscal year was \$712,837.00 or approximately 20% of the total expended and that the remaining balance was paid from general revenue funds of the District of Columbia (App. 14, 15).

On May 4, 1953 the lower court (Judge Holtzoff) entered an opinion on the defendants' motion to dismiss the complaint or in the alternative for summary judgment. While the contents of the opinion will be discussed at length at a later place in this brief, it will suffice, for the purpose of the statement of the case, to say that in said opinion the

lower court held Bullock not entitled to a mandatory injunction directing the appellants to restore him to duty but that Bullock did have "a right to receive the retirement annuity and is entitled to be placed eventually on the retirement roll on the basis of longevity" (App. 15 - 22).

On May 7, 1953, the lower court entered an order denying Bullock's motion to strike or suppress all or portions of the affidavit and supplemental affidavit of Murray, granting appellants' motion to dismiss Count 1 of the complaint, and denying appellants' motion for summary judgment respecting Count 2 of the complaint (App. 22, 23).

On May 14, 1953, the lower court entered an order denying Bullock's motion for a preliminary injunction (App. 23).

On May 18, 1953, appellants filed an answer to Count 2 of the complaint. Insofar as is pertinent, in their answer appellants admitted that Bullock had transmitted requests for retirement on the dates mentioned but denied that they had failed and refused to act upon said requests. Further answering Count 2, appellants stated that they had delayed acting upon said request while awaiting the completion of the investigation of the Senate Sub-committee investigating crime in the District of Columbia, and the decision of a certain Grand Jury impanelled to determine whether Bullock should stand trial for perjury. Appellants further stated that they were then awaiting the outcome of certain disciplinary charges then pending against Bullock (App. 24).

On May 13, 1953, the Commissioners appointed a Special Trial Board for the purpose of hearing charges against Bullock (App. 28).

On May 20, 1953, Bullock filed a motion for summary judgment (App. 24, 25).

On June 23, 1953, the lower court entered its findings of fact, conclusions of law and order (App. 25, 26). The court found (a) that Bullock was born February 11, 1897, and

appointed to the Metropolitan Police Department August 17, 1921, and had been a member thereof since that time; (b) that on February 11, 1952, Bullock, having attained the age of 55 years and having been a member of the Department for more than 25 years, made application in writing to the appellant Murray for voluntary retirement; (c) that written applications were again made March 5, 1952 and April 13, 1953, but appellants failed and refused to take action on any of the applications; and (d) that Bullock had been in a suspended status since May 23, 1952 (App. 25). The lower court concluded, as a matter of law, that Bullock was eligible for retirement for the reasons set forth in the opinion of the court filed May 4, 1953 (App. 25, 26). The lower court ordered appellants "to take appropriate action through their duly designated agents to place the plaintiff on the retirement roll of the Metropolitan Police Department; and * * * to award the plaintiff such retirement compensation from the Policemen and Firemen's Fund in an amount equal to 50 per centum per annum of the salary received by him on February 11, 1953, and that such retirement compensation shall be payable to him as of May 23, 1952". In the same order, the lower court stayed execution of the aforesaid order until the "decision of the Trial Board of the Metropolitan Police Department in the proceedings now pending before it against plaintiff" (App. 26).

The next day, June 24, 1953, the trial court entered an order granting Bullock's motion for summary judgment but stayed the entry of the judgment until after final disposition of the charges then pending against Bullock before the Trial Board (App. 26). In said order the court stated "following such final disposition of said charges as hereinbefore provided that defendants be and they are hereby directed to take appropriate action through their duly designated agents to place the plaintiff on the retirement roll of the Metropolitan Police Department" (App. 27).

On August 31, 1953, the Trial Board made a report, findings and recommendation to the Commissioners of the District of Columbia (App. 28). The charges against Bullock were (1) "Conduct unbecoming an officer", (2) "Failure to obey an order of a superior officer" and (3) "Conduct prejudicial to the reputation and good order of the Police Force" (App. 28, 29).

The specification with reference to charge No. 1 against Bullock was that he, being "a person residing in and receiving income in the District of Columbia for the years 1946, 1947 and 1948 in such amounts as would require him to file income tax returns in the office of the Assessor for the District of Columbia, did nevertheless fail and neglect to file such returns for the aforementioned years as required by law" (App. 28, 29).

The specification with reference to charge No. 2 was that Bullock "on or about the 27th day of April, 1953, having been ordered to report to the Chief of Police, and having been given a direct order to explain the source from which he received certain sums of money over and above that received by him as a member of the Metropolitan Police Department, * * * did refuse to obey such order of his superior officer" (App. 29).

The specifications with respect to charge No. 3 were (1) that Bullock, "on or about the 21st and 22nd days of May, 1952, having been called as a witness before the Sub-Committee of the U. S. Senate investigating crime in the District of Columbia, and being confronted with evidence tending to show the receipt by him and subsequent deposit of certain sums of money over and above that received by him as a member of the Metropolitan Police Department of the District of Columbia, did fail and neglect to explain upon being requested to do so by members of the Sub-Committee and counsel thereof the source from which said monies were received", and (2) that Bullock, "having been ordered into the office of the then Major and Superin-

tendent of the Metropolitan Police Department and being confronted with the transcript of his testimony before the Sub-committee of the U. S. Senate investigating crime in the District of Columbia showing the receipt of certain sums of money over and above that received by him as a member of the Metropolitan Police Department, and having been requested by the Major and Superintendent of Police to explain the sources from which he received this money, he did nevertheless fail and neglect to make such explanation" (App. 29, 30).

The Trial Board found "Inspector Albert I. Bullock guilty of each and every one of the charges preferred against him, together with their respective specifications" and recommended "his dishonorable discharge and dismissal forthwith, from the Metropolitan Police Department of the District of Columbia" (App. 31).

On September 14, 1953, the Board of Commissioners of the District of Columbia entered an order providing, in substance, as follows:

1. That the findings of the Trial Board be affirmed;
2. That so much of the recommendation of the Trial Board as provided for Bullock's dismissal from the Police Department be adopted;
3. That Bullock be dismissed from the Police Department as of September 14, 1953;
4. That the period of suspension of Bullock between October 22, 1951, and January 29, 1952, be with pay;
5. That the period of suspension of Bullock after May 23, 1952, be without pay;
6. That the deductions from the salary of Bullock during his service with the Police Department for the benefit of the policemen and firemen's relief fund be refunded to Bullock in accordance with the provisions of Secs. 4-503 and 4-504, D. C. Code, 1951 (App. 31, 32).

On October 9, 1953, appellants filed a motion for amendment of opinion, entry of judgment and modification of

order (App. 27). In said motion, appellants moved the lower court to amend its opinion of May 4, 1953, to enter judgment for the defendants and to modify its order of June 24, 1953, "upon the grounds that, as was contemplated by this Court in said order of June 24, 1953, the status of the plaintiff with respect to his rights has changed as evidenced by the report, findings and recommendation of the Special Trial Board made on August 31, 1953, * * * and by a certified copy of the order of the Commissioners of the District of Columbia of September 1953 affirming the findings of the Special Trial Board, adopting its recommendation and dismissing the plaintiff from the Metropolitan Police Force * * *" (App. 27).

In open court, on October 9, 1953, Judge Holtzoff expressed the opinion that "The Court has heard nothing that would lead it to change the view heretofore expressed" (App. 33).

On October 9, 1953, the lower court entered an order vacating the stay of entry of judgment as provided in the order of June 24, 1953, and directing the Clerk to enter said order of June 24, 1953 as the judgment in the case (App. 35).

From the order of October 9, 1953 this appeal was taken.

STATUTES INVOLVED

Section 1 of the Act of February 28, 1901, 31 Stat. 819, as amended by the Act of June 8, 1906, 34 Stat. 221, 223, provides in Par. 9 thereof that:

No officer or member of the said police force, under penalty of forfeiting the salary or pay which may be due him, shall withdraw or resign, except by permission of the Commissioners of the District of Columbia, until he shall have given the major and superintendent one month's notice in writing of such intention.¹

¹ This provision is codified as the third paragraph of Sec. 4-125, D. C. Code, 1951.

Section 4-126, D. C. Code, 1951 (which codifies Sec. 344 of the Revised Statutes of the District of Columbia, as amended by Sec. 6 of the Act of June 11, 1878, 20 Stat. 107) provides as follows:

It shall be the duty of the police force to respect and obey the major and superintendent of police as the head and chief of the police force, subject to the rules, regulations, and general orders of the Board of Commissioners.

Section 1 of the Act of February 28, 1901, 31 Stat. 819, as amended by Section 1, Par. 4 of the Act of June 8, 1906, 34 Stat. 221 (Sec. 4-121, D. C. Code, 1951) provides as follows:

Said Commissioners, in addition to the powers vested in them by law, are also hereby authorized and empowered to make, modify, and enforce, under such penalties as they may deem necessary, all needful rules and regulations for the proper government, conduct, discipline, and good name of said Metropolitan police force; and said Commissioners are hereby authorized and empowered to fine, suspend with or without pay, and dismiss any officer or member of said police force for any offense against the laws of the United States or the laws and ordinances or regulations of the District of Columbia, whether before or after conviction thereof in any court or courts, and for misconduct in office, or for any breaches or violation of the rules and regulations made by said Commissioners for the government, conduct, discipline, and good name of said police force: *Provided*, That no person shall be removed from said police force except upon written charges preferred against him in the name of the major and superintendent of said police force to the trial board or boards hereinafter provided for and after an opportunity shall

have been afforded him of being heard in his defense; but no person so removed shall be reappointed to any office in said police force: *Provided further*, That special policemen and additional privates may be removed from office by said Commissioners, or a majority of them, without cause and without trial: *Provided further*, That charges preferred against any member of said police force to the trial board or boards hereinafter provided for may be altered or amended, in the discretion of such trial board or boards, at any time before final action by such board or boards, under such regulations as the Commissioners may adopt, provided the accused have an opportunity to be heard thereon.

Section 1 of the Act of February 28, 1901, 31 Stat. 819, as amended by Par. 5 of Section 1 of the Act of June 8, 1906, 34 Stat. 222 (Sec. 4-122, D. C. Code, 1951) provides as follows:

The said Commissioners are also hereby authorized and empowered to create one or more trial board or boards, to be composed of such number of persons as said Commissioners may appoint thereto, for the trial of officers and members of said police force; and said Commissioners are hereby also authorized and empowered to make and amend rules of procedure before such trial board or boards and to change or abolish any such trial board or boards as they may deem proper; and the findings of such trial board or boards shall be final and conclusive unless appeal in writing therefrom is made within five days to the Commissioners of the District of Columbia, the hearings on appeal to be submitted either orally or in writing, and the decision of the said Commissioners thereon shall be final and conclusive: *Provided*, That said Commissioners shall not be required, in their review of the sentences and findings of such trial board or boards, to take evidence,

either oral, written, or documentary, and they shall have power to reduce or modify the findings and penalty of the trial board or boards or remand any case against any officer or member of said police force to such board or boards for such further proceedings as they may deem necessary: *Provided*, That the chairman for the time being of any and every trial board be, and he is hereby, authorized to administer oaths to and take affirmations of witnesses before such board or boards: * * * *And provided further*, That the rules and regulations of said Metropolitan police force heretofore promulgated and in force are hereby ratified and shall remain in force until changed, altered, amended, or abolished by said Commissioners.

The "Policemen and firemen's relief fund" while still referred to in various sections of the 1951 edition of the District of Columbia Code, was abolished as a separate fund in the sense that the moneys which formerly were deposited in it are now deposited into miscellaneous revenues of the District of Columbia and appropriations are made annually by the Congress for the purpose of paying retirement compensation by Section 14(a) of "An Act Providing that permanent appropriations be subject to annual consideration and appropriation by Congress, and for other purposes", approved June 26, 1934, 48 Stat. 1224, 1230, which provides as follows:

(a) On and after July 1, 1935, appropriations for the District of Columbia appearing on the books of the Government and listed in subsection (b) of this section are abolished as such, and so much of the several Acts as provide for such appropriations is amended so as to authorize in lieu thereof annual definite appropriations, estimates for which shall be incorporated in the estimates of annual appropriations for the District of Columbia.

(b) * * *

(4) Policemen and firemen's relief fund, District of Columbia (DCt614).

Section 12 of the Act of September 1, 1916, 39 Stat. 718, as amended by Section 7 of the Act of May 27, 1924, 43 Stat. 176, the Act of June 7, 1924, 43 Stat. 560 and Section 5 of the Act of July 1, 1930, 46 Stat. 840 (Sec. 4-503 D. C. Code, 1951) provides as follows:

The said fund shall consist of all fines imposed by the Commissioners of the District of Columbia upon members of the police and fire departments of said District by way of discipline; all rewards, proceeds of gifts, and emoluments that may be received by any member of said departments (for extraordinary services), except such part thereof as the said Commissioners may allow to be retained by members of said departments; a deduction of three and one-half per centum of the monthly salary of each member of said departments; donations; and the net proceeds of sales of unclaimed property in the custody of the property clerk of the police department; all of which shall be paid into the treasury of the United States to the credit of the "Policemen and firemen's relief fund, District of Columbia," herein provided for; and should the said fund at any time be insufficient to defray the expenditures hereinafter provided for, the Commissioners of the District of Columbia, in that event, are authorized, and it shall be their duty, to direct the collector of taxes of said District, and it shall be the duty of the said collector, pursuant to such direction, to pay into the treasury of the United States, out of the general revenue of the District of Columbia collected by him, to the credit of the said "Policemen and firemen's relief fund, District of Columbia," such sums as may be necessary from time to time to meet deficiencies in said fund. The moneys to the credit of the said fund shall be available for appropriation by Con-

gress annually only for expenditure on requisitions of the said commissioners for the purposes set forth in this Act, and all expenditures from said fund shall be made and accounted for in the same manner as other expenditures of the government of the District of Columbia are made and accounted for.

Section 5 of the Act of July 1, 1930, 46 Stat. 840 as amended by Section 4 of the Act of August 4, 1949, 63 Stat. 566 (Sec. 4-504, D. C. Code, 1951) provides as follows:

That commencing with the effective date of this Act there shall be deducted for the benefit of the policemen and firemen's relief fund 5 per centum of the monthly pay of each member of the Metropolitan police force, the fire department, the United States park police, and the White House police force. That hereafter, upon the separation from the service of any such member, except for retirement as authorized by existing law, he shall be refunded the deductions made from his salary for said fund, and should any such member subsequently be reappointed to any of such police forces or the fire department he shall be required to re-deposit to the credit of the policemen and firemen's fund the amount of deductions refunded to him. In the case of the death of any such member while in the service the amount of his deductions shall be paid to the legal representative of his estate, provided he leaves no widow or child or children entitled to and granted relief payable from said fund.

Section 6 of the Act of July 1, 1930, 46 Stat. 841, (Sec. 4-505, D. C. Code, 1951) provides as follows:

The Commissioners of the District of Columbia are hereby empowered to determine and fix the amount of the pension relief allowance heretofore and hereafter granted to any person under and in accordance with the provisions of section 12 of the Act entitled "An Act making appropriations to provide for the expenses of the government of the

District of Columbia for the fiscal year ending June 30, 1917, and for other purposes," approved September 1, 1916, and Acts amendatory thereof.

The third paragraph of Section 12 of the Act of September 1, 1916, 39 Stat. 718 (Sec. 4-506, D. C. Code, 1951) provides as follows:

Whenever any member of the police department or the fire department of the District of Columbia shall become temporarily disabled by injury received or disease contracted in the actual discharge of his duty, to such an extent as to require medical or surgical services other than such as can be rendered by the board of police and fire surgeons of said District, or to require hospital treatment, the expenses of such medical or surgical services, or hospital treatment, shall be paid from the policemen and firemen's relief fund, District of Columbia, provided for in this Act; but no such expenses shall be paid except upon a certificate of the said board of police and fire surgeons, or two members thereof, setting forth the necessity for such services or treatment and the nature of the injury or disease which rendered the same necessary, and upon the approval of the said certificate by the superintendent of the Metropolitan police or the chief engineer of the fire department, as the case may be, and the approval of the Commissioners of the District of Columbia.

The fourth paragraph of Section 12 of the Act of September 1, 1916, 39 Stat. 718, as amended by Section 1 of the Act of February 17, 1923, 42 Stat. 1263 and Section 1 of the Act of August 4, 1949, 63 Stat. 565 (Sec. 4-507, D. C. Code, 1951), provides as follows:

Whenever any member of the police department or the fire department of the District of Columbia shall become so permanently disabled

through injury received or disease contracted in the line of duty as to incapacitate him for the performance of duty, or, having served not less than twenty-five years and having reached the age of fifty-five years shall, for any cause, become so permanently disabled as to incapacitate him for the performance of duty and shall make written application therefor and said application shall be approved by the Commissioners of said District, or, having reached the age of sixty years, in the discretion of the said commissioners, he shall in either event be retired from the service thereof and be entitled to receive relief from the said policemen and firemen's relief fund, District of Columbia, in an amount not to exceed 50 per centum per year of the salary received by him at the date of retirement. In case of the death of any member of the police department or the fire department of the District of Columbia, before or after retirement from the service thereof, leaving a widow, or a child or children under eighteen years of age, the widow shall be entitled to receive relief from the said policemen and firemen's relief fund, District of Columbia, in an amount not to exceed \$125 per month, and each child under the age of eighteen years in an amount not exceeding \$25 per month: *Provided*, That such payments or any right thereto shall cease upon death or remarriage of the widow: *Provided further*, That any benefits to a child or children shall cease upon (1) attaining the age of eighteen years, (2) marriage, or (3) death: *And provided further*, That no widow, child, or children of any deceased member of the said Police Department or Fire Department resulting from any marriage contracted subsequent to the date of retirement of such member shall be entitled to any relief under the provisions of this Act.

Section 12 of the Act of September 1, 1916, 39 Stat. 721, as added to by the Act of October 14, 1940, 54 Stat. 1118 (Sec. 4-508, D. C. Code, 1951) provides as follows:

Whenever any member of the Metropolitan Police Department of the District of Columbia, or of the United States Park Police force, or of the White House Police force, or the Fire Department of the District of Columbia has served twenty-five years or more as a member of such department or police force, or the Fire Department of the District of Columbia, or any combination of such service, or whenever any member of the United States Secret Service, who has served twenty-five years in the service of the United States Government, the duties of whom in whole or in part related to the protection of the life of the President and who has actively performed duties other than clerical for ten years or more directly related to the protection of the President extended by the Secret Service Division and having reached the age of fifty-five years, he may, at his election, be retired from the service of any such police department or police force or Division or fire department, and shall be entitled to receive retirement compensation from the said policemen and firemen's relief fund, District of Columbia, in an amount equal to 50 per centum per annum of the salary received by him at the date of retirement: *Provided, however,* That in any fiscal year any such retirement shall be in accordance with such rules and regulations as may be adopted by the Commissioners of the District of Columbia, and in no fiscal year shall the amount of all such retirements authorized under the provisions of this paragraph aggregate more than \$30,000: *Provided further,* That, when any member of the United States Secret Service Division shall have performed service in connection with the protection of the President for ten years or more, thereby becoming subject to future retirement after twenty-five years' service under the provisions of this Act, that he shall be authorized to transfer all funds to his credit in the United States Civil Service Retirement Fund to the Policemen and Firemen's Relief Fund of the District of Columbia, and that after the transfer of such funds, the salary of that member shall be subject to the same deduc-

tions for credit to the Policemen and Firemen's Relief Fund of the District of Columbia as the deductions from salaries of other members contributing to that fund, and he shall be entitled to the same benefits as other members contributing to that fund.

The seventh paragraph of Section 12 of the Act of September 1, 1916, 39 Stat. 719 (Sec. 4-510, D. C. Code, 1951) provides as follows:

There is created in and for the District of Columbia a board to be known as the police and firemen's retiring and relief board, to be composed of the corporation counsel of said District and one member from each the police department and fire department, to be designated by the said commissioners, and the said commissioners are authorized to change the personnel of said board from time to time, in their discretion, and they are further authorized and empowered to make, modify, and to amend from time to time regulations and rules of procedure for the conduct of the said board. The said board shall consider all cases for the retirement and relief of members of the police department and the fire department rendered necessary or expedient under the provisions of this Act, and all applications for the relief of widows and children under sixteen years of age. In every case of retirement of a member of either of said departments the board of police and fire surgeons shall certify, in writing, to the said retiring and relief board the physical condition of the member for whom retirement and relief is sought. The said retiring and relief board shall give written notice to any member of said departments under consideration by it for retirement and relief to appear before the board and give such evidence under oath as he may desire, and the proceedings of the board shall be reduced to writing and shall show the date of appointment of such member, his age, his record in the service, and any other information that

may be pertinent to the matter of his retirement and relief. The said board is authorized and empowered to summon any person before it to give testimony, under oath or affirmation, as to any matter affecting retirement and relief under the provisions of this Act; and any member of the board shall have power to administer oaths or affirmations to witnesses appearing before the said board. Such summons shall be served by any member of the Metropolitan police force, and upon the refusal or neglect of a witness to appear before the said board or to testify when required, he or she may be compelled to attend and testify as provided in the Act of February twentieth, eighteen hundred and ninety-six, entitled "An Act to amend an Act entitled, 'An Act to punish false swearing before trial boards of the Metropolitan police force and fire department of the District of Columbia, and for other purposes,' approved May eleventh, eighteen hundred and ninety-two," and any witness knowingly making a false statement to the said board on any material matter shall be guilty of perjury and punishable accordingly. The said retiring and relief board shall in each case considered by it for retirement and relief submit to the Commissioners of the District of Columbia a report of its findings, and the said commissioners shall have power to approve, disapprove, or modify such findings or to remand any case for such further proceedings as they may deem necessary.

The eighth and ninth paragraphs of Section 12 of the Act of September 1, 1916, 39 Stat. 720, (Sec. 4-513, D. C. Code, 1951) provide as follows:

The Commissioners of the District of Columbia, in their discretion and at any time, may cause any person receiving any relief allowance under the provisions of this Act, who has served less than twenty-five years, to appear and undergo a medical examination, as the result of which the said commissioners shall determine whether the relief in

such case shall be continued, increased, decreased, or discontinued. Should any person receiving relief under the provisions of this Act, after due notice, fail to appear and undergo the examination prescribed here, the said commissioners are authorized in their discretion to reduce or entirely discontinue such relief.

The Commissioners of the District of Columbia may, in their discretion, reduce or discontinue the relief granted to any person under the provisions of this Act upon receipt of duly certified information from a court of competent jurisdiction that any person receiving such relief has been convicted in such court of any crime involving moral turpitude; and the said commissioners may also, in their discretion, reduce or discontinue the relief granted to any person under the provisions of this Act when it shall appear to their satisfaction from evidence before them that such person is a habitual drunkard or guilty of lewd or lascivious conduct.

The tenth paragraph of Section 12 of the Act of September 1, 1916, 39 Stat. 720 (Sec. 4-514 D. C. Code, 1951) provides as follows:

Any retired member of the police department or fire department of the District of Columbia receiving relief under the provisions of this Act may in time of flood, riot, conflagration, during extraordinary assemblages, or unusual emergencies, be called by the commissioners of said District into the service of the department from which he was retired with relief for such duty as his disability will permit of him performing, without compensation therefor; and the said commissioners shall have power to enforce compliance with the provisions hereof by withholding the payment of relief; but nothing contained in this section shall be construed to enforce residence in the District of Columbia upon any retired member of either of said departments when it shall appear to the satisfac-

tion of said commissioners that residence elsewhere is rendered necessary by the physical condition of such member.

STATEMENT OF POINTS

The lower court erred:

1. In holding that Bullock, who was dismissed from the Metropolitan Police Department of the District of Columbia, had an indefeasible vested right to receive retirement compensation by reason of age and length of service under the provisions of Sec. 4-508 (*supra*, p. 20).

2. In failing to hold that Bullock was not entitled to retirement compensation under the provisions of said Sec. 4-508, because he was dismissed from the Metropolitan Police Department of the District of Columbia and he was, therefore, neither a "member" nor was he receiving a "salary" upon which to base any annuity within the meaning and intent of said section.

3. In failing to grant appellants' motion to dismiss the complaint or in the alternative for summary judgment.

4. In granting Bullock's motion for summary judgment.

5. In entering an order for the entry of judgment for Bullock.

SUMMARY OF ARGUMENT

The statute involved is not self-executing. It does not declare that a police officer, upon reaching 55 years of age and after having served 25 years may retire; it is worded in the passive tense—it declares that such officer "may, at his election, be retired." (Underscoring supplied.)

The phrase "at his election" was not intended to, and does not in fact, represent a legislative intention to vest an officer, 55 years old and with 25 years of service, with an indefeasible right to receive retirement compensation. The legislative history of the statute shows that the quoted phrase was employed as a means to

prevent police officers meeting those conditions from being retired by compulsion.

The privilege of receiving retirement compensation is, under the statute, inflexibly conditioned upon the subjection of a police officer to recall into active service in time of emergencies. It is inconceivable that the Congress intended to either have the Commissioners recall dismissed officers into service or to reward them with retirement compensation if they are not subject to recall into active service.

Under certain circumstances set forth in the statute, the Commissioners may, in their discretion, reduce or even discontinue retirement compensation which has been previously allowed. This clearly shows that the privilege of receiving retirement compensation is not an indefeasible vested right.

Insofar as the case of Rudolph v. Mosheuvcl, 37 App. D. C. 76, is apposite to the one at bar, it supports the contention of appellants. The lower court misinterpreted the opinion in that case by failing to correlate the facts with the statements of law.

Bullock was dismissed from the police force after having been found guilty of "Conduct unbecoming an officer", the "Failure to obey an order of a superior officer" and "Conduct prejudicial to the reputation and good order of the Police Force". Under such circumstances, he is not entitled to receive retirement compensation. It is an implied condition of employment, and hence of the privilege of receiving retirement compensation, that the duties of a police officer shall have been faithfully performed. It is immaterial whether the proper authorities discover misconduct and file charges against him before or after the officer files an application for retirement. The mere filing of an application does not ipso facto retire the applicant.

ARGUMENT

I

Preliminary Discussion of the Statutes Involved

The basic statute involved is the Act of September 1, 1916. It has been amended a number of times, as appears

in preceding provisions of this brief. For purpose of convenience, hereinafter the various provisions of the statute, as amended, will be referred to by designating them as they appear in the 1951 edition of the District of Columbia Code although the quotations are from the statutes.

Under Section 4-504 it is provided that 5% of the monthly pay of each member of the police and other protective forces, shall be deducted for the benefit of the fund. It is also provided in that section that upon separation from the service of any member, except for retirement, he shall be refunded the deductions made from his salary and that in the case of the death of any member while in the service the amount of his deductions shall be paid to his legal representative, provided he leaves no widow or child or children entitled to and granted relief (*supra*, p. 18). In this connection it should be noted that although the "Policemen and firemen's relief fund", as such, has been abolished (*supra*, p. 16), Judge Holtzoff stated that "one of its (the fund's) principal sources consists of monthly deductions taken from the salaries of policemen and firemen" (App. 17—parenthetical matter supplied). It is significant, however, that the affidavit of the Deputy Budget Officer of the District of Columbia established that, of the amounts expended for the retirement of policemen and firemen during the fiscal year 1952, only 20% thereof represented contributions by policemen and firemen and that the remaining amount was paid from general revenue funds of the District of Columbia. It thus appears, therefore, that a greater portion by far (80%) of the amounts paid as retirement compensation to retired policemen and firemen is paid from funds in the general revenues of the District derived from sources other than deductions from salaries of policemen and firemen.

Under Section 4-505 the Commissioners are empowered to determine and fix the amount of the pension relief allowance (*supra*, p. 18).

Under Section 4-508 it is provided that whenever any member of the Police Department "has served twenty-five years or more as a member of such * * * police force * * * and having reached the age of fifty-five years, he may, at his election, be retired from the service of any such * * * police force * * *, and shall be entitled to receive retirement compensation from the said policemen and firemen's relief fund, * * * in an amount equal to 50 per centum per annum of the salary received by him at the date of retirement * * *" (*supra*, p. 20).

Section 4-510 created the "police and firemen's retiring and relief board" and established the composition thereof. It is provided in said section that the board "shall consider all cases for the retirement and relief of members of the police department * * * rendered necessary or expedient under the provisions of this Act". The Board is charged with the duty of giving written notice to any member under consideration by it for retirement and relief to appear before it and give such evidence, under oath, as he may desire. This section provides that the proceedings of the Board shall be reduced to writing and shall show the day of appointment of such member, his age, his record in the service, and "any other information that may be pertinent to the matter of his retirement and relief". The Board is authorized to summon any person before it to give testimony under oath, "as to any matter affecting retirement and relief under the provisions of this Act". The duty is fixed under this section upon the Board to "in each case considered by it for retirement and relief submit to the commissioners of the District of Columbia a report of its findings, and the said commissioners shall have power to approve, disapprove, or modify such findings or to remand any case for such further proceedings as they may deem necessary" (*supra*, p. 22).

Under the second paragraph of Section 4-513 the Commissioners are given authority to, in their discretion, "re-

duce or ~~dis~~continue the relief granted to any person under the provisions of this Act upon duly certified information from a court of competent jurisdiction that any person receiving such relief has been convicted in such court of any crime involving moral turpitude; and the said commissioners may also, in their discretion, reduce or discontinue the relief granted to any person under the provisions of this Act when it shall appear to their satisfaction from evidence before them that such person is a habitual drunkard or guilty of lewd or lascivious conduct" (*supra*, p. 23).

Under Section 4-514 the Commissioners are vested with power to recall into service in time of flood, riot, conflagration, during extraordinary assemblages, or unusual emergencies, any retired member of the Police Department, receiving relief under the Act for such duty as his ability will permit of his performing, without compensation therefor. The Commissioners may enforce compliance with this provision by withholding the payment of relief. (*supra*, p. 24)

II.

Bullock is Not Entitled to Receive the Retirement Compensation Provided by Sec. 4-508

It is true that when Bullock made his request for retirement on February 11, 1952, and March 5, 1952, he had as of January 29, 1952 been "tentatively restored to duty" (App. 5, 6). This latter date was also the date when the District Court directed a verdict of acquittal as to Bullock in a prosecution for criminal conspiracy (App. 11). Prior to that date, however, and while a Sub-committee of the United States Senate Committee Investigating Crime and Law Enforcement in the District was calling upon certain members of the police force, including Bullock, to testify concerning the sources of their income, Bullock had been under suspension (App. 5).

It is equally true, also, that prior to February 11, 1952, the date of Bullock's first request for retirement, the Commissioners had requested the Bar Association of the District of Columbia to appoint a committee to study Bullock's testimony before the grand jury (App. 6). Such a committee was appointed on February 12, 1952, but Bullock's testimony was not made available to the committee until March 11, 1952 (App. 12). Furthermore, Bullock did not testify before the Sub-committee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia until May 21 and 22, 1952 (App. 10, 11). Thus, it is clear that Bullock's first two requests for retirement came prior to the time when the Bar Association Committee, the appointment of which the Commissioners had previously requested, had the opportunity to study his testimony before the grand jury and prior to Bullock's testimony before the Senate Sub-committee. It appears that the Sub-committee hearings commenced in January, 1952 (App. 5) but extended over a considerable period of time.

As soon as he received and reviewed Bullock's testimony before the Senate Sub-committee, Murray immediately called upon Bullock for an explanation of the sources of his unexplained income as brought out in Bullock's testimony. Bullock informed Murray that he was unable at that time to give his Chief an explanation, stating merely that his attorney had retained the services of a certified public accountant to go over the deposits and withdrawals from his bank account. Murray gave Bullock every reasonable opportunity to explain the source of his income before suspending him on May 23, 1952 (App. 6, 7), and he was never restored to duty (App. 32). Bullock's application for retirement on April 13, 1953, came, as he concedes, while he was in a suspended status (App. 13). Notwithstanding its ruling, in the light of these facts, the trial court, however, could not help but recognize that "the public has an interest in this matter" (App. 16).

The question to be resolved in this case is comparatively simple: it is whether, under the provisions of the Act of September 1, 1916, a member of the police force has an indefeasible vested right to be retired and to receive retirement compensation upon reaching the age of 55 years and having completed 25 years of service, regardless of his prior conduct, regardless of whether he is dismissed before actually being retired and regardless of any stigma in connection with his conduct which exists at the time of his request for retirement.

The decision must be reached by a proper interpretation of the statute.

The case at bar is of the utmost importance. The morale and efficiency of the Police Department of the District of Columbia would be seriously affected by an affirmance of the decision of the lower court in this case.

The taxpayers of the District have a vital interest, not only from their concern in the maintenance of the morale and efficiency of the Department but from a fiscal standpoint. The implication in the lower court's opinion to the contrary notwithstanding, the principal source of the money used to pay retirement compensation under the statute is the general revenue fund of the District of Columbia. (In 1952, the ratio was approximately 80% from general revenue funds and 20% from deductions from salaries—App. 14).

The lower court correctly recognized "that the Metropolitan Police Department has the power to try the plaintiff on charges, and if found guilty to punish him either by a fine, or other disciplinary penalty, *such as removal from the service*"² (italics supplied, App. 22), but inconsistently and incorrectly, appellants submit, held that Bullock "has a right to receive the retirement annuity and is entitled to be placed eventually on the retirement roll on the basis of

² Judge Holtzoff characterized the charges (App. 28, 30) as "grave and serious" (App. 16).

longevity" (App. 22). It is difficult to conceive of any purpose which would be served by dismissing a police officer and then retiring him with compensation for life to be paid largely out of the public treasury. Appellants are firmly convinced that the Federal Congress never intended any such absurd results, and further that the wording of the statute, read in its entirety, makes that fact abundantly clear.

In reaching its decision, the trial court construed only one provision of the statute, viz. Sec. 4-508, and even that erroneously. In construing that section, the court stated that a police officer "'may retire at his election'". Since the foregoing phrase appears in quotation marks in the opinion (App. 18), it was apparently intended to represent the wording of the statute. If the statute were so worded some argument could be advanced, if other provisions of the statute were ignored, that Sec. 4-508 was a self-executing statute conferring an indefeasible vested right to retirement. The statute, however, is not in the quoted language.

Sec. 4-508 provides that, under certain conditions, a police officer "may, at his election, *be retired*" (italics supplied, *supra*, p. 20). Since the language is in the passive tense, it seems certain that retirement under that section is not automatic.

The lower court interpreted the phrase "at his election" as if it conferred an absolute right to receive retirement pay, rather than the right to apply for it and "be retired" (App. 18). An examination of the legislative history of the Act of October 14, 1940, (*supra*, p. 20) reveals the purpose underlying the use of that language. In report No. 1987 to accompany H. R. 8846, 76th Congress, 3rd Session, it is stated, *inter alia*, that:

"There are no compulsory features in the bill and therefore no hardship will be worked on any man by forcing him out of the service. The measure is purely optional."

It will be observed that, under the law which existed prior to the Act of October 14, 1940, and which still exists, provision was made for the retirement of a policeman or a fireman who (1) became so permanently disabled through injury received or disease contracted *in line of duty* as to incapacitate him for performance of duty, or (2) who, having served not less than 25 years and having reached the age of 55, had become so permanently incapacitated *for any cause*, or (3) who had reached the age of 60 years. It was provided that "in the discretion of the said Commissioners, he shall in either event be retired from the service thereof and be entitled to receive relief * * * in an amount not to exceed 50 per centum per annum of the salary received by him at the date of retirement" (*supra*, p. 20; see also p. 2 of said report No. 1987). Under these provisions of law, the Commissioners, in their discretion, may retire a policeman who has reached the age of 60 years whether or not he wishes to be retired. By the enactment of the Act of October 14, 1940, a new category of policemen and firemen who might "be retired" was added to those classes set forth above. This class embraced the same qualifications as those in category (2) above, except the requirement of being permanently incapacitated. If, therefore, the Congress in enacting provisions concerning this new class had simply added a 4th category and made that category subject to the quoted phrase "in the discretion of the said Commissioners, he shall in either event be retired from the service * * *", the Commissioners would have been empowered to retire any policeman who reached 55 years of age and had served not less than 25 years regardless of whether he wished to be retired. It seems clear, accordingly, that the purpose underlying the use of the phrase "may, at his election, be retired" in the 1940 Act was to prevent a police officer or a fireman in good health from being forced to retire upon reaching the age of 55 years and completing 25 years of service. This is manifest from the

statement in the House Report, quoted above, that "There are no compulsory factors in the bill and therefore no hardship will be worked on any man by forcing him out of the service".

The statute clearly contemplates that some action must be taken by someone other than the applicant alone.

These conclusions are supported by an examination of the various provisions of the statute.

Sec. 4-508 sets forth four (4) specific criteria which must be met before a police officer "may, at his election, be retired". Eligibility for retirement is granted to a policeman who (1) has served 25 years; (2) has reached the age of 55 years; (3) is a "member of the Metropolitan Police Department"; and (4) is receiving a salary "at the date of retirement" (*supra*, p. 20). On February 11, 1952, Bullock was 55 years old and had served 25 years. He had not, however, been retired—he had simply requested it. Such request came at a time when the Commissioners had requested the appointment of a Bar Association committee for the purpose of studying Bullock's testimony before a grand jury and at a time when a Senate Subcommittee was in the process of investigating crime and law enforcement in the District. Bullock was one of the police officers who was called upon to testify before the Subcommittee concerning his sources of income (App. 5). For the Commissioners to have granted his requests for retirement of either February 11, 1952, or March 5, 1952, both of which dates were subsequent to the time when he had been called upon to give testimony before the Subcommittee (App. 5), in all probability would have had the effect of frustrating the United States Senate's investigation of crime and law enforcement in the District of Columbia.

Under Sec. 4-510 (*supra*, p. 22) "the police and firemen's retiring and relief board" was created. It was provided that the "board shall consider all cases for the retirement and relief of members of the police department * * * ren-

dered necessary or expedient under the provisions of this Act". It may well be that not all cases for retirement must be considered by the Board in view of the quoted language.³ But, in view of the circumstances prevailing at the time of Bullock's requests for retirement, if any cases for retirement are "rendered necessary or expedient" for careful screening by the Retiring Board and the Commissioners under the Act, this case was one.

The lower court stated that the jurisdiction of the Police and Firemen's Retiring and Relief Board in considering cases for retirement for longevity "is confined to deciding whether the applicant has had the required length of service and has reached the requisite age" (App. 19). Under Sec. 4-510, however, the Board "shall give written notice to any member of said departments under consideration by it for retirement and relief to appear before the board and give such evidence under oath as he may desire, and the proceedings of the board shall be reduced to writing and shall show the date of appointment of such member, his age, *his record in the service, and any other information that may be pertinent to the matter of his retirement and relief*" (*supra*, p. 22). It is further provided in Sec. 4-510 that the Board is empowered "to summon any person before it to give testimony, under oath or affirmation, as to any matter affecting retirement and relief under the provisions of this Act" (italics supplied, *supra*, p. 23).

It is further provided in Sec. 4-510 that the Board "shall in each case considered by it for retirement and relief submit to the Commissioners * * * a report of its findings, and the said commissioners shall have power to *approve, disapprove, or modify* such findings or to remand any case for such further proceedings as they may deem necessary" (italics supplied, *supra*, p. 23).

³ An example of a case which would not be "necessary or expedient" would be one where the police officer was retired by order of the Commissioners upon reaching the age of 64 years, the maximum age fixed by the Commissioners for compulsory retirement pursuant to Sec. 4-507, D. C. Code, 1951.

That a policeman does not, upon reaching 55 years of age and having served 25 years have an indefeasible vested right to retirement pay is made clear by the provisions of Sec. 4-513 (*supra*, p. 23). Under the second paragraph of this section it is provided that the Commissioners "may, in their discretion reduce or discontinue the relief granted to any person under the provisions of this Act upon receipt of duly certified information from a court of competent jurisdiction that any person receiving such relief has been convicted in such court of any crime involving moral turpitude; and the said commissioners may also in their discretion reduce or discontinue the relief granted to any person under the provisions of this Act when it shall appear to their satisfaction from evidence before them that such person is a habitual drunkard or guilty of lewd or lascivious conduct" (*supra*, p. 24). Surely, if the Commissioners have power to discontinue retirement pay under the conditions set forth in the statute, they have power, in the first instance, to refuse to grant it under the same conditions.

A very convincing reason why the Commissioners should not be compelled, under the decision of the lower court, to grant Bullock retirement pay is found in the provisions of Sec. 4-514 (*supra*, p. 24). Under this section, the Commissioners are given authority to call into service, in time of flood, riot, conflagration, during extraordinary assemblages, or unusual emergencies any retired member of the Police Department receiving relief under the Act for such duty without compensation, as his disability will permit him to perform. The Commissioners are vested with power to enforce this provision by withholding the payment of relief (*supra*, p. 24). This provision of the statute manifests an obvious intention on the part of Congress to condition the granting of retirement pay upon subjection to recall into service. If Bullock is retired on pension, pursuant to the order of the lower court, it would be an improper and ludicrous action for them to call him back into service, under

Sec. 4-514, after having dismissed him from the force for (1) "Conduct unbecoming an officer", (2) "Failure to obey an order of a superior officer", and (3) "Conduct prejudicial to the reputation and good order of the Police Force" (App. 28, 29, 31, 32).

The provision in Sec. 4-514 which specifically states that service pursuant to being recalled thereunder shall be "without compensation" for such service is significant. This legislative scheme clearly indicates that the amounts paid under Sec. 4-508 are "compensation". As a matter of fact, the very specific designation "retirement compensation" was used. Notwithstanding the language of the statute, however, the trial court spoke of the retirement compensation as being "in the nature of old age insurance, rather than old age pensions" (App. 20). In other instances, the lower court spoke of the retirement compensation as being an "annuity" (App. 18, 20, 34), thereby indicating an opinion that such compensation was in the nature of the proceeds of a policy of insurance providing for an annuity to the policyholder. This erroneous view was probably the prevailing factor which led the court to hold that Bullock had a vested right to receive the compensation (App. 20, 22, 33).

It is significant also that a policeman may not even withdraw or resign when he wants to. Under the third paragraph of Sec. 4-125 it is provided that "No officer or member of said police force, under penalty of forfeiting the salary which may be due him, shall withdraw or resign, except by permission of the Commissioners of the District of Columbia, until he shall have given the major and superintendent one month's notice in writing of such intention" (*supra*, p. 13).

Appellants submit that the statute does not require, as the lower court held, that the Commissioners must retire Bullock, whom they dismissed from the force for offenses committed prior thereto.

Decisions of this Court involving the retirement of policemen and firemen having even the remotest pertinency to the case at bar are:

MacFarland v. Bieber, 32 App. D. C. 513,

As stated therein, "The sole question" was "whether or not appellee acquired such a vested right in the pension granted by the act of Congress as could not be divested by a subsequent act of Congress" (p. 518). In reversing the judgment of the lower court, this court stated, (p. 521) *inter alia*, that, "A pension is not granted because of any property right the petitioner has or may acquire in it, but purely as an act of gratitude from the bounty of government."

And at 32 App. D. C. 520, this Court quoted from *United States ex rel. Burnett v. Teller*, 107 U. S. 64, 27 L. Ed. 352, 2 S. Ct. 39, that "No pensioner has a vested legal right to his pension." * * *

Rudolph v. U. S. ex rel. Stuart, 36 App. D. C. 379.

In that case, it was held that the retirement pension (under an Act of Feb. 25, 1885, 23 Stat. 316) did not contemplate payments to dependents of a retired policeman who committed suicide. It was stated, *inter alia*, that, "The statute differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable, after a party enters the service, either before or after the right to a pension accrues." (36 App. D. C. 384)

Rudolph et al. v. U. S. ex rel. Rock, 55 App. D. C. 362, 6 F. 2d 487.

There it was held, in reversing the decision of the lower court, that the appellee, a retired policeman, was not entitled to receive a pension as such since he had been convicted of an offense involving moral turpitude, viz. "boot-legging".

The *Bieber*, *Stuart*, and *Rock* cases, like *Rudolph v. Mosheuvel*, *infra*, concerned the right of policemen or firemen who were retired for disability to receive retirement compensation.

Other cases involving the right of policemen and firemen to retirement compensation, under varying statutes and circumstances, are:

People ex rel. Hardy v. Greene, 84 N. Y. S. 673;
People ex rel. Eakins v. Roosevelt et al., 34 N. Y. S. 228;
Flood v. Monaghan et al., 108 N. Y. S. 2d 414;
Gorman et al. v. City of New York et al., 110 N. E. 2d 895;
MacIntyre et al. v. Retirement Board et al., 42 Cal. App. 2d 734, 109 P. 2d 962.

See also 3 *McQuillin, Municipal Corporation*, 1949 ed., Sections 12.141 *et seq.*

Further discussion of the action of the lower court is pertinent.

As was hereinbefore stated, the trial court stayed the entry of judgment in favor of Bullock until after final disposition of the charges pending against him before the Trial Board (App. 22, 26, 27).

It was supposed by counsel for appellants that the reason for that action was that the lower court was aware that Bullock's status might be affected by the disposition of the charges and, consequently, his right to retirement pay. Such apparently was not the reason as is evidence by the following colloquy in open court:

THE COURT: Of course, when he applied for retirement he was a member.

MR. WALKER: He was a member, that is true, and that is the reason we think, if the Court please, that this Court well anticipated some change in that status, and for that reason stayed the entry of the judgment.

THE COURT: No, that was not what motivated the Court in staying the entry of the judgment. What motivated the Court in staying the entry of the judgment was this: If I had ordered him to be placed on the retired list forthwith, there might have been a question as to the power to try him on charges, and I felt that it was in the public interest not to frustrate the trial, and that is the reason why I postponed the entry of judgment long enough to allow the trial to be had and the decision reached by the District authorities.

MR. WALKER: If your Honor please, we thought the opinion contained the clear statement that the Metropolitan Police Department did have the power.

THE COURT: There is no doubt about the fact that the Metropolitan Police Department had the power to try Bullock. I did not want to interfere with that power by ordering him to be placed on the retired list forthwith, because then there might have been a question as to whether the trial could have been had. * * *

That was the reason why I stayed the entry of the judgment. (Tr. 45, 36,—see also Tr. 54).

The court's statements concerning the reason which motivated its staying the execution of the judgment in Bullock's favor until after disposition of the charges pending against Bullock are difficult to comprehend. The lower court stated in its opinion that "There is no doubt that the Metropolitan Police Department has the power to try the plaintiff on charges and if found guilty to punish him either by a fine, or other disciplinary penalty, such as removal from the service. It is proper to delay his retirement for a reasonable time for that purpose." (App. 22). In the foregoing quoted colloquy the lower court indicated that it did not want to interfere with the exercise of that power by ordering Bullock placed on the retirement list forthwith because "then there might have been a question as to whether the trial could have been had". As was hereinbefore stated, no useful purpose could possibly be served by

dismissing a police officer pursuant to findings of a trial board and then placing him on the retired list at maximum retirement compensation pursuant to a court order.

The lower court stated that it felt itself compelled to reach the decision it did because of the decision of this Court in *Rudolph v. Mosheuvel*, 37 App. D. C. 76. Appellants consider that case to be, for the most part, inapposite to the one at bar, but, to some extent, it supports appellants contentions.

In the *Mosheuvel* case the Commissioners dismissed a fireman without notice or hearing as required by their own rule. It appears that while complaints had been made against Mosheuvel during the period 1900 through 1905, he was never tried thereon and was promoted to the rank of captain. Certain charges made against him and others in January 1908, were reported unsustained by a trial board, and the record of such trial board proceedings was transmitted to the Commissioners by the Chief of the Fire Department without recommendation in February. The next month, on March 20th, Mosheuvel sustained serious injuries at a fire to which he had been ordered, as a result of which he was unable to perform active duty thereafter. On the following July 31st, the Chief made a report to the Commissioners in which he stated that the appearance of Mosheuvel on March 20, 1908, the date of his injury, indicated that he had been drinking, and that he, the Chief, believed the accident would not have occurred but for that condition. In his report of July 31, 1908, the Fire Chief referred back to the aforesaid report of the trial board, said that in his opinion the charges had in fact been sustained, and made the serious charge against Mosheuvel that he was intoxicated at the fire on March 20th, when he was injured. No notice of the charges concerning intoxication was given to Mosheuvel, and the Commissioners "immediately" entered the order dismissing him from the service. This Court held that it was not necessary for it to decide whether the

Commissioners had the power to dismiss the fireman without notice and hearing.

That case is distinguishable from the one at bar. There is here involved an alleged right to retirement for longevity. The *Mosheuvel* case is concerned with disability. Moheuvel was dismissed without notice or hearing. Bullock was served with notice of the charges, had a hearing and an oral appeal to the Commissioners therefrom.

Contrary to the apparent interpretation of the *Mosheuvel* case by Judge Holtzoff, this Court did not go so far as to declare that policemen and firemen have an absolute right to retirement benefits. What this Court did hold in that case was that the lower court was not in error in ordering a writ of mandamus to issue "*commanding the commissioners to cause the assembling of the proper board to investigate and report the physical condition of the relator*", and that "*The order*" of the lower court "*was defective in * * * that it did not further direct that said board should also report whether the physical disability, if found to exist, is due to injuries received in the line of duty, and not the result of relator's own indiscretion.*" This Court said that the order of the lower court "*went too far in commanding the commissioners, upon the coming in of a report showing relator's disability, to grant him such a pension as the same may warrant.*" (Italics supplied.) Finally, this Court stated that:

"Under the requirements of the rules, if the afore-said report shows the essential facts before mentioned, it must be referred to the retiring board to be appointed, whose duty it will be to consider the same, together with relator's record, and to make recommendation of the amount of pension to be allowed, within the limits of the act of Congress. If the reports show the necessary facts, it is to be presumed that the commissioners will make the necessary final order granting the pension."

The obvious implication from this language is that if, thereafter, a retiring board reported to the Commissioners

a finding that Mosheuvél received his injuries from his "own indiscretion", he would not be entitled to any order granting him retirement or a pension.

If the decision of the lower court should be upheld, any police officer who has reached the age of 55 years and who has had 25 years of service could refuse to obey any or all orders of his superior officers and commit any offense unbecoming an officer or prejudicial to the reputation and good order of the police force, and still be secure in the knowledge that he could retire at half pay.

Appellants believe, as did the District Court of Appeals of California, Div. I, in *MacIntyre v. Retirement Board*, 42 Cal. App. 2d 734, 109 P. 2d 962, 963, 964 that:

" * * * It is never contemplated that an officer or employee guilty of conduct warranting dismissal should continue in office or be permitted to receive other emoluments offered as an inducement to honesty and efficiency. The right to a pension is not indefeasible, and an employee, though otherwise entitled thereto, may not be guilty of misconduct in his position and maintain his rights notwithstanding such dereliction of duty. * * *

"Without regard to the time of the vesting of pension rights, it is an implied condition of employment, and hence a condition of such vesting that the duties of the employee shall have been faithfully performed; it is immaterial whether the proper authorities discover the misconduct and file charges before or after the application for a pension so long as the charges are filed before an order is made by the retirement board. The filing of the application does not ipso facto retire the applicant. It is necessary that an order of retirement be duly made. Up to that time the police officer, whether under suspension or in actual service, is under the control and jurisdiction

of the police commission. If, prior to an order of the retirement board, he is dismissed upon charges of conduct unbecoming an officer, he is not entitled to 'a pension' as that term is used in the charter."

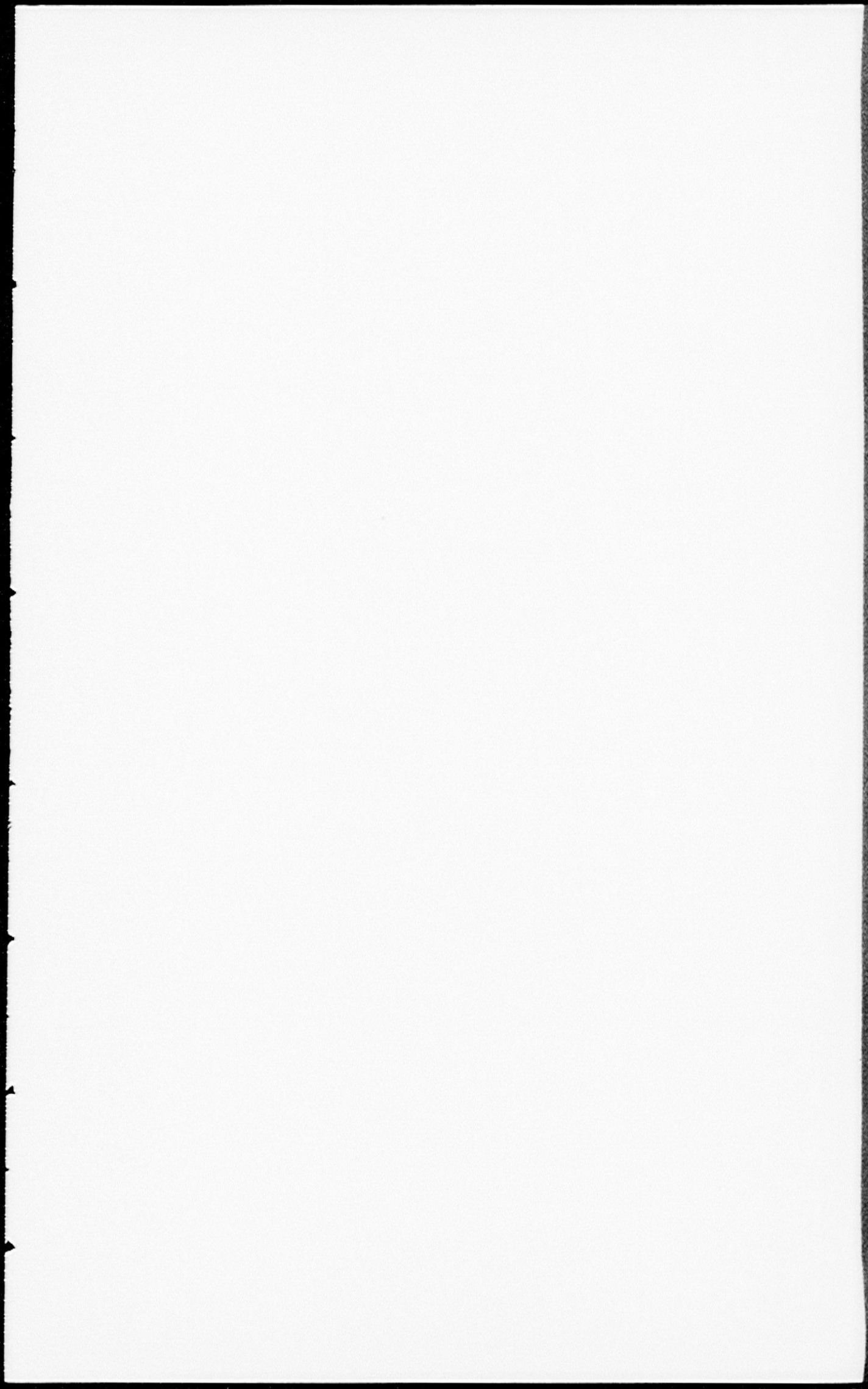
CONCLUSION

Bullock, having been found guilty of conduct unbecoming an officer, of the failure to obey an order of a superior officer, and of conduct prejudicial to the reputation and good order of the police force, and having been dismissed from the force, is not entitled to receive retirement compensation. The opinion, the conclusion of law, the judgment, the order granting Bullock's motion for summary judgment, and the final order of the lower court are all erroneous. Its judgment and orders should, accordingly, be set aside; the case should be remanded to that court with directions to grant the motion of appellants to dismiss the complaint or in the alternative for summary judgment; and the lower court should be ordered to enter judgment for appellants, defendants below.

Respectfully submitted,

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 CHESTER H. GRAY,
Principal Assistant Corporation
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JOINT APPENDIX



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* * * * *

41 UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 1678-53

ALBERT I. BULLOCK, *Plaintiff*,

vs.

SAMUEL SPENCER, RENAH F. CAMALIER, LOUIS W. PRENTISS,
Board of Commissioners, District of Columbia, and
ROBERT V. MURRAY, Metropolitan Police Department,
Defendants.

* * * * *

68 COMPLAINT FOR MANDATORY INJUNCTION
DIRECTING RESTORATION TO DUTY OF
POLICE OFFICER AND DIRECTING ACTION ON RE-
QUEST FOR RETIREMENT

The amounts involved in the claims herein are in excess
of \$3,000 and are within the exclusive jurisdiction of this
Court.

Count One

1. Plaintiff was appointed a member of the Metropolitan
Police force of the District of Columbia on August 17, 1921,
and served as a member of the Metropolitan Police Depart-

ment continuously from that date to October 23, 1951, at which time plaintiff was suspended from duty without pay.

2. On January 29, 1952, plaintiff was restored to duty by defendant Murray with the advice and approval of the Board of Commissioners; plaintiff continued on duty until May 23, 1952, at which time he was suspended by defendants, and said suspension has continued to the date of the filing of this complaint.

3. On to wit April 13, 1953, plaintiff by written communication addressed to defendant Murray requested that
69 defendant remove the plaintiff from suspension; and said defendant, along with the other defendants, has failed and refused to remove plaintiff from suspension.

4. Said refusal by the defendants so to do is arbitrary, capricious, and without authority of law, and in derogation of the legal rights of the plaintiff.

5. Plaintiff has no other remedy available other than that requested herein.

WHEREFORE, plaintiff prays:

1. That the Court issue a preliminary injunction directing defendants to remove the plaintiff forthwith from suspension in the Metropolitan Police Department for the District of Columbia and restore him to duty in said Department.

2. That the Court issue a permanent injunction herein directing the defendants to remove the plaintiff forthwith from suspension in the Metropolitan Police Department for the District of Columbia and restore him to duty in said Department.

3. That the Court grant such other and further relief as the nature of the case may require and as to the Court may seem just and proper.

Count Two

1. Plaintiff was born on February 11, 1897, and was appointed to the Metropolitan Police Department on August

17, 1921, and has been a member of the Metropolitan Police Department since that date.

2. On February 11, 1952, plaintiff became eligible for voluntary retirement by virtue of Section 4-508, of the D. C. Code, by virtue of having served for more than 25 years on the Metropolitan Police Department and having attained the age of 55 years.

70 3. On February 11, 1952, defendant transmitted a written request for retirement pursuant to the provisions of said Section 4-508, to defendant Murray, but said defendant and the other defendants have failed and refused to act on said request.

4. On March 5, 1952, plaintiff repeated the said request in writing to defendant Murray, and defendant Murray and the other defendants again failed and refused to act on such request.

5. On April 13, 1953, plaintiff again repeated his request for retirement to defendant Murray, and said defendant Murray and the other defendants again failed and refused to act on said request.

6. Said failure and refusal on the part of the defendants to act on plaintiff's election and request for voluntary retirement as provided by law, is arbitrary, capricious, and in violation of law and is in complete derogation of plaintiff's rights.

7. Plaintiff has no other remedy available to him other than that requested herein.

WHEREFORE, plaintiff prays:

1. That the Court issue a preliminary injunction directing the defendants to forthwith take appropriate action in effecting the retirement of plaintiff in accordance with his election and request, and award to plaintiff such retirement compensation from the Policemen and Firemen's Relief Fund as plaintiff is entitled to under the law.

2. That the Court issue a permanent injunction directing the defendants to forthwith take appropriate action in ef-

fecting the retirement of plaintiff in accordance with his election and request, and award to plaintiff such retirement compensation from the Policemen and Firemen's Relief Fund as plaintiff is entitled to under the law.

71 3. That the Court grant such other and further relief as the nature of the case may require and as to the Court may seem just and proper.

* * * * *

72 MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves the Court to issue a preliminary injunction directing the defendants:

1. To remove the plaintiff forthwith from suspension in the Metropolitan Police Department for the District of Columbia and restore him to duty in said Department;
2. To take appropriate action forthwith in effecting the retirement of plaintiff in accordance with his election and request, and award to plaintiff such retirement compensation from the Policemen and Firemen's Relief Fund as plaintiff is entitled to under the law.

As grounds for this motion, plaintiff refers to his verified complaint filed herein.

* * * * *

73 DEFENDANTS' MOTION TO DISMISS COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendants move this Honorable Court to dismiss this cause of action for the reason that the complaint fails to state a claim against defendants upon which relief can be granted. In the alternative, defendants move for summary judgment for the reason that there is no genuine issue as to any material fact and defendants are entitled to judg-

ment as a matter of law. Exhibits A and B, and C, in opposition to plaintiff's motion, are attached hereto and made a part of this motion.

* * * * *

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EXHIBIT A

AFFIDAVIT OF ROBERT V. MURRAY

Robert V. Murray, being first duly sworn, on oath deposes and says that he is the Chief of Police, Metropolitan Police Department, District of Columbia; the basic reasons why Inspector Albert I. Bullock, a member of the Metropolitan Police Department, has been suspended, and not restored to duty are as follows:

(a) Inspector Bullock failed to explain and reveal sources of income to the Sub-Committee of the United States Senate Committee investigating crime and law enforcement in the District of Columbia.

In January, 1952, hearings were held by the Sub-Committee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia. Inspector Albert I. Bullock was one of the members of the Metropolitan Police Force, D. C., who was called upon to give testimony before the Sub-committee as to his source of income. Inspector Albert I. Bullock attended the hearings and was interrogated by members of the Sub-committee but he failed to explain or reveal the sources of his income, although he was given every opportunity by the members of the Sub-committee to do so. During this period of time, Inspector Albert I. Bullock was under suspension as he was under indictment by the United States Court for the District of Columbia.

On January 29, 1952 the Honorable James R. Kirkland, Judge of the United States District Court for the District of Columbia, upon motion of Inspector Bullock's Attorney granted a directed verdict of ac-

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quittal. Inspector Albert I. Bullock was tentatively restored to duty at 4:00 P.M. on January the 29th, 1952.

(b) Inspector Albert I. Bullock failed to explain the sources of his income, over and above his salary, to the Chief of Police.

The Board of Commissioners, D. C., had requested the Bar Association of the District of Columbia to appoint a committee of members of the Association to study the testimony of Inspector Albert I. Bullock before the Grand Jury. On February 11, 1952 Inspector Albert I. Bullock submitted an application to be retired from the Metropolitan Police Department to be effective at the earliest possible date. On February 13, 1952, the application of Inspector Albert I. Bullock for retirement was forwarded to the Board of Commissioners, D. C., but the undersigned made the recommendation that no action be taken upon the application of Inspector Albert I. Bullock to retire from the Metropolitan Police Department until such time as a recommendation was received by the Board of Commissioners from the Bar Association which was studying the testimony given before the Grand Jury by this official. On March 5, 1952, Inspector Albert I. Bullock again made application for retirement.

Upon receiving the testimony given by Inspector Albert I. Bullock before the United States Senate Crime Committee the undersigned made a study of the testimony, completed same at about 3:00 P. M. on May 23, 1952, and immediately called upon Inspector Albert I. Bullock for an explanation of the source of his unexplained income as brought out in his testimony. Inspector Bullock informed the undersigned that he was unable at that time to give me an explanation but that his attorney, Mr. Charles Ford, had retained the services of a Certified Public Accountant to go over his deposits and withdrawals from his bank account. After having given Inspector Albert I. Bullock every reasonable opportunity to explain the source of his income, which he failed to do, the under-

signed suspended Inspector Albert I. Bullock from duty at 4:10 P.M., on Friday, May 23, 1952.

On April 10, 1953, the undersigned, was informed by the Honorable Charles M. Irelan, United States Attorney, that the Grand Jury considering the testimony of Inspector Albert I. Bullock, given before the Senate Crime Committee, had completed their inquiry. No criminal indictment was returned against Inspector Albert I. Bullock.

On April 13, 1953, Inspector Albert I. Bullock, while still in a suspended status, delivered to the office of the Chief of Police a letter requesting the immediate removal of his suspension from duty as a member of the Metropolitan Police Department and again made application for immediate retirement. Inspector Albert I. Bullock was informed that an explanation of the source of his income over and above his salary must be made, both to the Metropolitan Police Department and to the public, and that until such time as such explanation was forthcoming he would remain suspended.

The undersigned has been advised by the income tax authorities that, in accordance with the facts and circumstances mentioned in Exhibit "C", the affidavit of Richard S. Morgan, whose office is presently conducting an investigation concerning Inspector Albert I. Bullock, preliminarily that investigation has revealed failure on the part of Inspector Bullock to file income tax returns for the years 1946, 1947 and 1948. A study is being made to determine whether Inspector Bullock has reported all income received during years for which he has filed returns.

These reasons have been communicated by me to the Commissioners of the District of Columbia. I am authorized to say that they have concurred unanimously in the reasons set forth respecting the suspension of Inspector Bullock, and the refusal to restore him to duty.

77 The undersigned has repeatedly stated to Inspector Bullock, who is one of the senior inspectors

of the Police Department, that he must explain the sources of his income over and above the salary he received as an official of the Police Department; that he is obligated both to the Police Department and to the public to make such an explanation, and that his suspension will be continued in force and effect until such satisfactory explanation is made, or the matter is referred to the Police Trial Board for appropriate action.

ROBERT V. MURRAY

* * * * *

EXHIBIT B

78 GOVERNMENT OF THE DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT

January 27, 1948

MEMORANDUM ORDER NO. 11,
Series 1948

SUBJECT: All members of the Metropolitan Police Force who are applicants for Voluntary Retirement must appear before the Police and Firemen's Retiring and Relief Board.

TO THE FORCE:

The following order of the Commissioners, D. C., dated January 16, 1948, C. O. 302,501 (#594237), is published for your information and guidance:

"ORDERED:

That after the approval of this order, all members of the Metropolitan Police Department of the District of Columbia, the United States Park Police Force, the White House Police Force, and

the Fire Department of the District of Columbia, who are applicants for retirement under the provisions of Section 4-508 of the 1940 D. C. Code (The Act of September 1, 1916, 39 Stat. 721, ch. 433, sec. 12, paragraph added by act of October 14, 1940, 54 Stat. 1118, ch. 860) shall in each and every such case appear before the Police and Firemen's Retiring and Relief Board for consideration of all matters pertinent to their retirement.

By order of the Board of Commissioners, D. C.

/s/ G. M. Thornett,
Secretary to the Board

The subject matter of Section 4-508 referred to above is:

“Voluntary retirement—Age and service requirements—Benefits—Transfer of funds.”

By direction of the Major and Superintendent:

/s/ Floyd A. Truscott.

Floyd A. Truscott,
*Assistant Superintendent,
Acting Executive Officer.*

* * * * *

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EXHIBIT C

AFFIDAVIT OF RICHARD S. MORGAN

DISTRICT OF COLUMBIA: ss

Richard S. Morgan, being first duly sworn on oath, deposes and says that he is Supervising Examiner, Individual Income Tax Section of the Assessor's Office of the District of Columbia. That pursuant to a directive from the Commissioners of the District of Columbia, he has conferred

with the Corporation Counsel and the Chief of Police respecting the Income Tax Returns of Inspector Albert I. Bullock. His review of the records discloses the following:

For the years 1946, 1947, and 1948 there is no record of any D. C. Income Tax Return having been filed by or on behalf of Inspector Albert I. Bullock. Respecting those returns that have been filed for other years, the only income reported is that derived from the Inspector's position as a member of the Metropolitan Police Department. No other income emanating from any source is reported on D. C. Income Tax Returns filed by or on behalf of Inspector Bullock. Affiant further avers that he has on several occasions both in writing and over the telephone requested both Inspector Bullock and his attorney, Charles E. Ford, to file the Income Tax Returns for the years 1946, 1947, and 1948. In spite of these requests no returns have been filed by or on behalf of Inspector Bullock with the District of Columbia for the years in question.

[s] Richard S. Morgan

Richard S. Morgan

* * * * *

89 SUPPLEMENTAL AFFIDAVIT OF
ROBERT V. MURRAY

DISTRICT OF COLUMBIA: SS

Robert V. Murray, being first duly sworn on oath, deposes and says that he is Chief of the Metropolitan Police Department, District of Columbia. He makes this affidavit in supplement to and by way of clarification of the affidavit dated 21 April 1953 heretofore filed in the above-captioned cause.

Inspector Bullock's testimony before the Subcommittee of the United States Senate Committee investigating crime and law enforcement in the District of Columbia was given

on May 21, 1952. Inspector Bullock attended these hearings and was interrogated by members of the Subcommittee and Committee counsel but failed to explain or reveal the sources of his income over and above his Police Department salary, although he was given every opportunity to do so.

As of May 21, 1952, Inspector Bullock had been tentatively restored to duty, this action having been taken on January 29, 1952, the same day Judge Kirkland directed a verdict of acquittal as to Bullock in the conspiracy case entitled United States v. Nelson et al.

90 On May 23, 1952, after the undersigned had reviewed the testimony of Inspector Bullock before the Senate Sub-committee, for the reasons set forth on page 2 of the original affidavit, he suspended Inspector Bullock.

Robert V. Murray

* * * * *

91 MOTION TO STRIKE OR SUPPRESS ALL OR PORTIONS OF AFFIDAVIT DATED APRIL 21, 1953 OF ROBERT V. MURRAY AND SUPPLEMENTAL AFFIDAVIT OF ROBERT V. MURRAY DATED APRIL 23, 1953

Plaintiff moves the Court to strike or suppress all or portions of the affidavits of Robert V. Murray filed herein, relating to testimony of plaintiff before the Subcommittee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia on May 21 and May 22, 1952, and to strike or suppress any and all reference in said affidavits pertaining to the contents of a questionnaire submitted by plaintiff under compulsion to said Committee.

The ground for this motion is that the said matters are immune from use as evidence.

* * * * *

92 AFFIDAVIT OF ALBERT I. BULLOCK, PLAINTIFF IN OPPOSITION TO AFFIDAVIT OF ROBERT V. MURRAY DATED APRIL 21, 1953

DISTRICT OF COLUMBIA, ss:

Albert I. Bullock, being first duly sworn, on oath deposes and says:

(a) He denies that he failed to explain and reveal sources of income to the Subcommittee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia but states the true facts to be that in response to a subpoena he personally appeared before said Committee on May 21, 1952 and May 22, 1952, and in reply to extensive questions by said Committee, consisting of approximately 144 pages Volumes 10 and 11 of the Report of Proceedings of said Committee, answered substantially all of said questions propounded to him to the best of his knowledge and ability as of that time, and did, to the best of his ability, as of that time explain and reveal the sources of his income.

(b) On February 12, 1952 a committee from the Bar Association was appointed by the Board of Commissioners to make a study of the testimony of affiant given by him before the Grand Jury, which Grand Jury had returned an indictment against affiant in Criminal No. 1459-51, in this Court, and on which indictment affiant was acquitted

93 by this Court. On or about February 21, 1952 a petition was filed in this Court (In re Bullock—Misc. Docket No. 8-52) on behalf of the Board of Commissioners and/or their representatives (Bar Association Committee) requesting the disclosure of affiant's testimony before said Grand Jury. On March 11, 1952 in a memorandum opinion and order this Court directed the official stenographer and the United States Attorney to make the said Grand Jury testimony of affiant available to the Commissioners and

their representatives. The said Bar Association Committee made its report on March 20, 1952, and that the said Commissioners and/or defendant Murray have had said report since that time, a period of more than one year.

On February 11, 1952, and on March 5, 1952, affiant, in conformity with the usages of the Metropolitan Police Department, and in accordance with proper channels, transmitted to defendant Murray affiant's requests for retirement. From January 29, 1952 to May 23, 1952 affiant was not in a suspended status, but was in good standing as an Inspector in the Metropolitan Police Department, and it was during this period that he made both applications for retirement as aforesaid; that during said period there were no charges of any nature pending against affiant, and affiant was eligible and qualified in every respect for said retirement.

During a period of the past seven months a Grand Jury in and for the District of Columbia diligently and honestly exercised all of its powers and prerogatives in an investigation of affiant's heretofore mentioned testimony before the said Senate Committee for the purpose of determining if there was any evidence that affiant had committed perjury in said testimony before said Committee. The said Grand Jury officially reported that there was no such evidence.

94 After more than one year had elapsed since the report of said Bar Association Committee, and after the said Grand Jury exonerated affiant as aforesaid, affiant on April 13, 1953, through proper channels, made application for both restoration to duty and retirement.

Since the date of affiant's indictment in October, 1951 up to and including the date of this affidavit affiant has never been charged for any offense in violation of any law, rule or regulation of the United States, District of Columbia or the Metropolitan Police Department; affiant has received no

pay, during all of this time, other than for the period January 29, 1952 to May 22, 1952.

/s/ Albert I. Bullock

Albert I. Bullock

* * * * *

95 AFFIDAVIT OF ROBERT V. MURRAY

Robert V. Murray, being first duly sworn, on oath deposes and says that he is the Chief of the Metropolitan Police Department, in the District of Columbia, and that certain charges and specifications attached hereto and made a part hereof, were prepared under his supervision and were personally served by Deputy Chief William J. Cunningham of the Metropolitan Police Department upon Inspector Albert I. Bullock on the 28th day of April, 1953, at 7:00 P. M., at his home.

Robert V. Murray

* * * * *

EXHIBIT D

97 AFFIDAVIT OF WILLIAM G. WILDING

DISTRICT OF COLUMBIA, ss:

William G. Wilding, being first duly sworn, on oath deposes and says that he is the Deputy Budget Officer of the District of Columbia; that as such, he assists in the preparation of the annual budget of the District of Columbia. He has performed this service for the past 30 years. He makes this affidavit on his own personal knowledge.

Official records of the District of Columbia show that the total amount expended during the fiscal year 1952 for the retirement of policemen and firemen was \$3,559,420.00. These records also disclose that the amount of retirement deductions from policemen's and firemen's salaries during 1952 was \$712,837.00. Thus, the amount of the contribu-

tion by policemen and firemen was approximately 20%. The remaining balance was paid from general revenue funds of the District of Columbia.

/s/ William G. Wilding

William G. Wilding

* * * * *

98

OPINION

Charles E. Ford, Esq., of Washington, D. C., for the plaintiff.

Vernon E. West, Esq., Corporation Counsel, and Oliver Gasch, Esq., Assistant Corporation Counsel, for the District of Columbia, for the defendants.

This case came on for a hearing on the defendants' motion to dismiss the complaint or in the alternative for summary judgment.

The suit is brought by a member of the Metropolitan Police Department of Washington, D. C. against the Board of Commissioners for the District of Columbia and the Chief of Police. The complaint consists of two counts. The first count alleges that the plaintiff has been suspended from duty and that the Chief of Police has refused to grant

his request to be removed from suspension. It seeks
99 a mandatory injunction directing the defendants to restore him to duty. The second count alleges that the plaintiff has become eligible for voluntary retirement by virtue of having served as a member of the Metropolitan Police Department for more than twenty-five years and having attained the age of fifty-five years; that he has requested retirement; but that the defendants have failed and refused to act on his request. Accordingly, the plaintiff prays for a mandatory injunction directing the defend-

ants to effect his retirement, and to allow him the retirement annuity provided by law.

At the conclusion of the argument, the Court dismissed the first count of the complaint. The Chief of Police is clothed with broad powers to administer the Metropolitan Police Department, to assign its personnel, and to discipline its members. The courts may not interfere with the internal management of the Department. Any other rule would be intolerable. It might be ruinous to the efficiency and morale of the police force and adversely affect the police protection of the community.

The validity of these principles is demonstrated by the record before the court in the case at bar. The defendant Robert V. Murray, the Chief of Police, states in an affidavit that the plaintiff was suspended from duty because of his failure to explain and reveal the sources of his income to a subcommittee of a Senate Committee investigating crime and law enforcement in the District of Columbia, and further because of his failure to explain the sources of his income to the Chief of Police. Formal charges have been filed against the plaintiff embodying these specifications as well as accusing him of a failure to file District of Columbia income tax returns for the years 1946, 1947 and 1948. He has been ordered to report before a Police Trial Board for trial.

The charges are grave and serious. Refusal by a Government officer or employee to disclose to proper authority sources of outside income can hardly be treated with indifference. For obvious reasons, the public has an interest in this matter. This is especially true in the case of law enforcement officers. If the income is honestly derived, no reason is perceived why this fact should not be revealed to a superior officer or to a Congressional Committee. Concealment naturally arouses suspicion. At times it leads to an unfavorable inference. It is not unreasonable to assume that resort would not be had to concealment unless

there was something to conceal. Similarly, failure to file income tax returns may be a criminal offense. Manifestly the charges should be tried. It is entirely proper, in fact desirable, to suspend the plaintiff from duty until a final disposition is reached in respect to them.

There remains for consideration the second count of the complaint, which involves the right of the plaintiff to retire and to receive the retirement annuity provided by law. The solution of this problem depends, in turn, on the statutory provisions relating to retirement annuities for members of the Metropolitan Police Department. The fund out of which the payments are made is created by statute (D. C. Code, 1951, Title 4, Secs. 503, 504). Five percent is deducted from the monthly salary of every member of the Police and Fire Departments and is paid into the fund.¹ To

101 these accumulations there are added all fines imposed on members of either Department by way of discipline, as well as rewards, proceeds of gifts, and emoluments that may be received by any member of either department for extraordinary services, except such part thereof as the Commissioners may allow to be retained by the member. Finally the net proceeds of sales of unclaimed property in the custody of the property clerk of the Police Department, also find their way into the fund. If at any time it is insufficient to defray expenditures, the Commissioners of the District of Columbia are required to direct the Collector of Taxes to pay into the fund such sums as may be necessary to meet the deficiencies. It is clear, therefore, that the fund is maintained in connection with a contributory retirement system, and that one of its principal sources consists of monthly deductions taken from the salaries of policemen and firemen.

The statute provides for retirement of two types. The first is retirement for total disability (Sec. 507), and the

¹ Section 503, which provides for a deduction of 3½% has been amended by Section 504, which provides for a deduction of 5%.

second is retirement on a longevity basis (Sec. 508). In addition, an allowance for temporary disability incurred in the actual discharge of duty, may be paid from the fund (Sec. 506). We are concerned here with retirement on the basis of longevity.

The law provides (Sec. 508) that any member of the Metropolitan Police Department who "has served twenty-five years or more as a member of such department. . . . and having reached the age of fifty-five years . . . may, at his election, be retired from the service and shall be entitled to receive retirement compensation from the said . . . fund in an amount equal to 50 per centum per annum of the salary received by him at the time of retirement".²

102 In other words, a police officer who has served twenty-five years as a member of the police department and who has reached the age of fifty-five, is accorded the option of retiring, and receiving an annuity equal to 50 per cent of the salary received by him at that time. The election to retire for longevity is granted to the police officer. No choice is extended to the Department. It is claimed by the defendants, however, that the right to retire is not absolute, but that the District of Columbia Government has discretion to grant or deny an application to retire for longevity. Two arguments are advanced in support of this contention. The first is that the word "may" rather than "shall" is used in the statute. Obviously, however, the word "may" is used in order to grant to the police officer eligible to retire the privilege of doing so. He has the choice whether to exercise the right of retiring for longevity. He "*may* retire at his election." Moreover, the words "may" and "shall" are frequently used interchangeably without too great an effort to be precise.

The principal basis for the position advanced by the District of Columbia Government is that Section 510 creates a Board to be known as the Police and Firemen's Retiring

² Emphasis supplied.

and Relief Board, and that the statute further provides that "the Board shall consider all cases for the retirement and relief of members of the Police Department and the Fire Department". It is argued that this provision implies that the Board is vested with discretion to grant or deny applications for retirement predicated on longevity. This conclusion by no means follows. It must be borne in mind that some agency is needed to adjudicate applications for retirement for disability, because at times such
 103 applications involve a determination of close and difficult questions of fact. Likewise it is necessary to establish some agency to pass on applications for temporary relief. Doubtless the Board was organized with these considerations in mind. It was also granted jurisdiction over applications for retirement for longevity. In these cases its function is limited and restricted. It is confined to deciding whether the applicant has had the required length of service and has reached the requisite age.

The mere fact that a Board is established to pass on applications does not give rise to an inference that the Board has discretion to grant or deny applications for reasons not specified in the statute. Its function is to determine whether the applicant for retirement is within the pertinent statutory provisions. If the Board had broad powers not conferred by statute a question would arise how far its discretion could be carried. For example, could it deny an application for retirement for longevity because of shortage of policemen? Could it deny an application for retirement because the police officer was guilty of some minor infraction of discipline? If the argument of the defendants' counsel is correct, then the Board would have a right to deny any application for any reason whatsoever so long as it did not act arbitrarily and capriciously. To endow the Board with such authority requires express statutory provisions. None, however, exist. The Congress has not seen

fit to include in the statute the terms that the defendants' counsel would read into it by implication.

A similar question was presented in *Rudolph v. Moshevel*, 37 App. D. C. 76, 82. A fireman, who sustained severe injuries in the performance of his duties applied for retirement for disability. Subsequently charges
104 were filed against him and he was dismissed from the force. The court held that he was nevertheless entitled to retirement pay. Mr. Chief Justice Shepard said:

"... the right of the relator to retirement on a pension under the terms of the law were fixed at the time that he received his injuries. . . The commissioners could not, by dismissing him on charges made thereafter, deprive him of the bounty provided by law, which they had no power to suspend. Having come within the terms of the statute, no power less than that of Congress could repeal or suspend its benefits."

Applying this doctrine to the instant case, the plaintiff's right to a retirement annuity became fixed when he completed twenty-five years of service and reached the age of fifty-five.

It is important to bear in mind that the retirement annuities involved in this case are not pensions or gratuities. They are paid out of a fund to which each officer makes a considerable contribution. The payments are in the nature of old age insurance, rather than old age pensions. The system is a contributory one. It is in the public interest that the integrity of old age retirement plans be maintained. Contributory plans of this nature have developed both in Government and in private industry very rapidly during the past generation. Their creation and growth are due to an enhanced social consciousness, which recognizes that the average person who works for a salary or wages, is gen-

erally unable to save enough to provide for his old age. Retirement systems have been introduced for the purpose of alleviating hardship and distress that has existed on a large scale for centuries, and also for the purpose of protecting the public treasury from large payments for relief to indigent old people. The statutory construction for

105 which defendants' counsel contend might adversely affect not only the policemen's and firemen's retirement plan, but also the much larger contributory schemes for employees of the Federal Government. Wrath aroused by an individual case, no matter how well-founded and wholesome, must not be permitted to sway our judgment to the extent of leading us to cut loose from our moorings and devise a new rule for the occasion, which may plague us in the future and possibly impair a well-organized beneficent system.

The defendants' counsel while minimizing the importance of the decision in *Rudolph v. Mosheuvel*, 37 App. D. C. 76, which is binding on this Court, cite several cases from other jurisdictions. Each of these rulings, however, depends on the phraseology of a different statute.

The statute involved in *People ex rel. Brady v. Martin et al.*, 145 N. Y. 253, decided by the New York Court of Appeals in 1885, expressly provided that any member of the police force who had served for a period of twenty years or more, might in the discretion of the Board of Police *by a resolution adopted by a majority vote of the full board* be retired from service and placed on the pension roll. Thus the law in express terms conferred discretion on the Board of Police to grant or deny retirement. No such provision is found in the statute involved in this case.

The pertinent statute in *Pierne v. Valentine*, 291 N. Y. 333 provided that the granting of a pension on severance from service for fault or delinquency shall not be a matter of right, but such a pension might be granted by the board of trustees by a two-thirds vote. No similar provision is con-

tained in the District of Columbia Act.

106 *People ex rel. Hardy v. Greene*, 84 N. Y. Supp. 673, is a decision of a New York intermediate appellate court rendered in 1903. The result was reached by a vote of three to two. A vigorous dissenting opinion urged that the relator's right to a pension was indefeasible. Consequently great weight may not be attached to this case, especially as against the authority of the Court of Appeals for this Circuit, *Rudolph v. Mosheuvel*, 37 App. D. C. 76.

The remaining opinions cited by defendants' counsel either fail to state the contents of the pertinent statute or else do not deal with the point presented here. Consequently they are not helpful.

There is no doubt that the Metropolitan Police Department has the power to try the plaintiff on charges, and if found guilty to punish him either by a fine, or other disciplinary penalty, such as removal from the service. It is proper to delay his retirement for a reasonable time for that purpose. The plaintiff, however, has a right to receive the retirement annuity and is entitled to be placed eventually on the retirement roll on the basis of longevity.

The defendants' motions as to Count II of the complaint are denied.

/s/ Alexander Holtzoff

United States District Judge.

May 4, 1953

* * * * *

107

ORDER

This cause came on for hearing on plaintiff's motion for preliminary injunction and plaintiff's motion to strike or suppress all or portions of the affidavit and supplemental affidavit of Robert V. Murray, and on defendants' motion to dismiss or in the alternative for summary judgment; and upon consideration of supporting and opposing memo-

randa filed by respective counsel and affidavits filed in support of their respective positions, and upon oral argument in open Court, it is by the Court this 7 day of May, 1953,

ORDERED, that plaintiff's motion to strike be and the same hereby is denied;

* * * * *

It is further ordered that defendants' motion to dismiss Count I of the complaint be and the same hereby is granted and judgment hereby is entered for defendants as to Count I;

It is further ordered that defendants' motion for summary judgment respecting Count II of the complaint be and the same hereby is denied, and defendants are given ten (10) days from the date of entry hereof to file their answer thereto; and

* * * * *

109

ORDER

Upon consideration of plaintiff's motion for preliminary injunction and of the pleadings and memoranda and affidavits in support thereof and in opposition thereto, and upon oral argument in open Court, it is, by the Court this 14 day of May, 1953.

ORDERED, ADJUDGED, and DECREED that the motion for preliminary injunction be and the same hereby is denied. * * *

/s/ Alexander Holtzoff
Judge

* * * * *

110

ANSWER

First Defense

The complaint fails to state a claim upon which relief may be granted.

*Second Defense**Answer**Count I*

Count I having been dismissed by order of the Court, dated May 7, 1953, no further answer is required.

Count II

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation as to the date of birth of plaintiff. The remaining allegations of paragraph 1 are admitted.

2. Allegations of paragraph 2 are conclusions of law which defendants are not required to answer, but if answer is required defendants deny these allegations.

3, 4 and 5. Defendants admit that plaintiff transmitted a request for retirement on the dates mentioned, but defendants deny they have failed and refused to act upon said requests. Further answering said allegation defendants say they have delayed acting upon said request awaiting the completion of the investigation of the Senate Subcommittee investigating crime in the District of Columbia, and the decision of a certain Federal grand jury impanelled to determine whether plaintiff should stand trial for perjury, and defendants further say they are at present delaying awaiting the outcome of certain disciplinary charges pending against plaintiff.

6. The allegations of paragraph 6 are denied.

7. The allegations of paragraph 7 are conclusions of law to which answer is not required but if answer be required defendants deny the allegations of paragraph 7.

* * * * *

112 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court that it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary

judgment in plaintiff's favor for the relief demanded in the claim alleged in Count Two of the complaint, on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law.

* * * * *

114 JUDGMENT FOR INJUNCTION

This cause came on to be heard on plaintiff's Motion For Summary Judgment; and the Court having considered the verified complaint, the answer, as well as the affidavits submitted in support of said motion and in opposition thereto, and the arguments had on said motion, the Court makes the following:

FINDINGS OF FACT

a. Plaintiff was born on February 11, 1897, and was appointed to the Metropolitan Police Department on August 17, 1921, and has been a member of the Metropolitan Police Department since that time.

b. On February 11, 1952, plaintiff having attained the age of 55 and having been a member of the Metropolitan Police Department for more than 25 years, made application in writing to the defendant Murray for voluntary retirement.

c. Written applications were again repeated on March 5, 1952 and on April 13, 1953, but defendants failed and refused to take action on any of these applications.

d. Plaintiff has been on suspended status since May 23, 1952.

On the basis of the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

1. That plaintiff is eligible for retirement by reason of having attained the age of 55 and having served for
115 longer than 25 years, pursuant to the Code of Laws for the District of Columbia, as is more specifically

detailed in the written opinion of the Court filed herein on May 4, 1953.

And it is therefore, this 23 day of June, 1953

ORDERED:

That the defendants are directed to take appropriate action through their duly designated agents to place the plaintiff on the retirement roll of the Metropolitan Police Department; and that the defendants and their said duly designated agents are directed to award the plaintiff such retirement compensation from the Policemen and Firemen's Fund in an amount equal to 50 per centum per annum of the salary received by him on February 11, 1953, and that such retirement compensation shall be payable to him as of May 23, 1952.

Execution of this Judgment is stayed until the decision of the Trial Board of the Metropolitan Police Department in the proceedings now pending before it against plaintiff.

/s/ Alexander Holtzoff
Judge

* * * * *

116

ORDER

This cause came on for hearing on plaintiff's motion for summary judgment; and upon consideration of plaintiff's motion, and points and authorities in support thereof and in opposition thereto, and upon consideration of the verified complaint and answer thereto and oral argument in open court by respective counsel, it is by the Court this 24th day of June, 1953,

ORDERED that plaintiff's motion for summary judgment be and the same hereby is granted, provided, however, that the entry of judgment be and the same hereby is stayed until after final disposition of the charges now pending against plaintiff before the Trial Board of the Metropolitan

Police Department in accordance with the provisions of Section 4-122, D. C. Code, 1951.

And it is further ORDERED that following such final disposition of said charges as hereinbefore provided that defendants be and they are hereby directed to take appropriate action through their duly designated agents to place the plaintiff on the retirement roll of the Metropolitan Police Department.

/s/ Alexander Holtzoff,
Judge

* * * * *

117 DEFENDANTS' MOTION FOR AMENDMENT
OF OPINION AND ENTRY OF JUDGMENT
AND FOR MODIFICATION OF ORDER

The defendants move the Court to amend its opinion entered herein May 4, 1953, to enter judgment for the defendants and to modify its order of June 24, 1953, upon the grounds that, as was contemplated by this Court in said order of June 24, 1953, the status of the plaintiff with respect to his rights has changed as evidenced by the report, findings and recommendation of the Special Trial Board made on August 31, 1953, a copy of which is attached hereto as Exhibit A and made a part hereof by reference, and by a certified copy of the order of the Commissioners of the District of Columbia of September 1953 affirming the findings of the Special Trial Board, adopting its recommendation and dismissing the plaintiff from the Metropolitan Police Force of the District of Columbia, a copy of which order is attached hereto as Exhibit B and made a part hereof by reference.

* * * * *

EXHIBIT A

118 GOVERNMENT OF THE DISTRICT OF
COLUMBIA

METROPOLITAN POLICE DEPARTMENT

WASHINGTON, D. C.

IN RE: TRIAL BOARD PROCEEDINGS, INSPECTOR
ALBERT I. BULLOCKREPORT, FINDINGS AND RECOMMENDA-
TIONS OF A SPECIAL TRIAL BOARD TO
HEAR CHARGES PRESENTED AGAINST
ALBERT I. BULLOCK

The undersigned, Donald Clemmer, Robert F. Cogswell, and Colonel Harry F. Hansen, United States Army, were appointed by order of the Commissioners of the District of Columbia, dated May 13, 1953, as a Special Trial Board, hereinafter referred to as the Board, for the purpose of conducting a hearing of charges presented by the Chief of Police against Inspector Albert I. Bullock of the Metropolitan Police Department of the District of Columbia, and for the purpose of making a report, findings and recommendations thereon. Said Robert F. Cogswell was named Chairman of the Board by the Commissioners.

The charges preferred against said Inspector Albert I. Bullock, which form the basis of this report and recommendations are as follows:

Charge #1: "Conduct unbecoming an officer" in violation of Chapter XXXV, Section 22, Paragraph (n) of the Manual of the Metropolitan Police Department.

Specification: In that Inspector Albert I. Bullock, being a person residing in and receiving income in the District of Columbia for the years 1946, 1947 and 1948 in such amounts as would require

him to file income tax returns in the office of the Assessor for the District of Columbia, did nevertheless fail and neglect to file such returns for the aforementioned years as required by law.

Charge #2: "Failure to obey an order of a superior officer" in violation of Chapter XXXV, Section 22, Paragraph (q) of the Manual of the Metropolitan Police Department.

Specification: In that on or about the 27th day of April, 1953, having been ordered to report to the Chief of Police, and having been given a direct order to explain the source from which he received certain sums of money over and above that received by him as a member of the Metropolitan Police Department, he did refuse to obey such order of his superior officer.

Charge #3: "Conduct prejudicial to the reputation and good order of the Police Force" in violation of Chapter XXXV, Section 22, Paragraph (r) of the Manual of the Metropolitan Police Department.

Specification #1: In that on or about the 21st and 22nd days of May, 1952, having been called as a witness before the Sub-Committee of the U. S. Senate investigating crime in the District of Columbia, and being confronted with evidence tending to show the receipt by him and subsequent deposit of certain sums of money over and above that received by him as a member of the Metropolitan Police Department of

the District of Columbia, did fail and neglect to explain upon being requested to do so by members of the Subcommittee and counsel thereof the source from which said monies were received.

Specification #2: In that, having been ordered into the office of the then Major and Superintendent of the Metropolitan Police Department and being confronted with the transcript of his testimony before the Sub-committee of the U. S. Senate investigating crime in the District of Columbia showing the receipt of certain sums of money over and above that received by him as a member of the Metropolitan Police Department, and having been requested by the Major and Superintendent of Police to explain the sources from which he received this money, he did nevertheless fail and neglect to make such explanation.

Prior to the hearings conducted by this Board, several challenges were directed to the Commissioners of the District of Columbia by counsel for Albert I. Bullock against the appointment of each and all of the members of the Board, collectively and individually, all of which challenges were denied.

The matter came on for a hearing in Room 301, Municipal Court Building, Washington, D. C., on June 24, 1953, at 10 o'clock A. M. pursuant to an agreed adjournment on Tuesday,—June 9, 1953, it having been represented at the hearing on that date by Joseph Sitnick, Esquire, of counsel for Inspector Bullock that his co-counsel Charles E. Ford was ill and unable to appear.

The three duly appointed members of the Board were present at all hearings. At the first and ensuing hearings, Inspector Bullock, who was present, was represented by Messrs. Charles E. Ford and Joseph Sitnick of the District of Columbia Bar and Robert D. Wise, Esquire, Assistant Corporation Counsel for the District of Columbia appeared on behalf of Robert V. Murray, Chief of the Metropolitan Police Department.

* * * * *

144 Upon consideration, therefore, of all the evidence, the Trial Board finds Inspector Albert I. Bullock guilty of each and every one of the charges preferred against him, together with their respective specifications, and recommends his dishonorable discharge and dismissal forthwith, from the Metropolitan Police Department of the District of Columbia.

* * * * *

EXHIBIT B

147 September 14, 1953

The Board of Commissioners of the District of Columbia having by order dated May 13, 1953, appointed a special trial board for the purpose of conducting a hearing of charges made by the Chief of Police against Inspector Albert I. Bullock of the Metropolitan Police Department of the District of Columbia and for the purpose of making a report, findings and recommendation to the said Board of Commissioners, and said special trial board having, on August 31, 1953, made a report, findings and recommendation to the said Board of Commissioners with respect to said charges, and after having considered said report, findings and recommendation and after having heard oral argument on an appeal therefrom taken by the said Inspector Albert I. Bullock, it is, this 14th day of September, 1953:

ORDERED:

1. That the findings of said special trial board be, and the same hereby are, affirmed;

2. That so much of the recommendation of said special trial board as provides for the dismissal of the said Inspector Albert I. Bullock from the Metropolitan Police Department of the District of Columbia forthwith be, and the same hereby is, adopted;
3. That Inspector Albert I. Bullock be, and he is hereby, dismissed from the Metropolitan Police Department of the District of Columbia as of September 14, 1953;
4. That the period of suspension of the said Inspector Albert I. Bullock effective from and after October 22, 1951 and ending on January 29, 1952 be with pay; and
5. That the period of suspension of the said Inspector Albert I. Bullock effective from and after May 23, 1952 be without pay; and
6. That the deductions from the salary of Albert I. Bullock during his service with the Metropolitan Police Department of the District of Columbia for the benefit of the policemen and firemen's relief fund be refunded to said Albert I. Bullock in accordance with the provisions of Sections 4-503 and 4-504, D. C. Code 1951.

148 By order of the Board of Commissioners, D. C.

/s/ G. M. Thornett,
Secretary

Board of Commissioners, D. C.

Official copy furnished:

Albert I. Bullock

Finance Officer

Acct. Officer

Charles Ford, Esq.

Joseph Sitnick, Esq.

Police Department

Corporation Counsel

Gen. Files

* * * * *

150

ORDER

This cause came on to be heard upon the oral motion of the plaintiff to vacate the stay of entry of judgment as provided in the order of the Court herein dated June 24, 1953, and to direct the Clerk to enter forthwith the said order of June 24, 1953, as the judgment herein, and after oral argument thereon in open court by counsel for the respective parties, it is, by the Court, this 17th day of September,

ORDERED, that the said motion be, and the same is hereby denied without prejudice.

/s/ Alexander Holtzoff
Judge

Seen:

Joseph Sitnick

Attorney for plaintiff

Washington, D. C.,

Friday, October 9, 1953.

The above-entitled action came on for hearing on defendant's motion for amendment of opinion and entry of judgment and for modification of order before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, at 11:15 o'clock a. m.

* * * * *

65

OPINION OF THE COURT

THE COURT: The Court has heard nothing that would lead it to change the view heretofore expressed.

I might say, by way of elucidation, that my decision was based substantially upon the proposition that Congress fixed the terms upon which a police officer and a fireman is entitled to be retired. The retirement scheme is a contributory plan and results in vested rights being created in the members of the plan or scheme. Congress has pro-

vided the terms on which members of the two forces are entitled to retirement annuities, and it did not provide that the retirement annuity shall be forfeited if the member of the force who is otherwise entitled to retirement has been guilty of misconduct. I have no reason to doubt that Congress did have the power so to provide. Such a provision then would become part of the terms of the retirement plan. I do not feel, however, that the Court has a right to read into the statute something that Congress did not insert in it, nor do I feel that any discretion is granted to the Commissioners to deprive a person of his retirement rights for reasons that the Commissioners consider valid. That discretion has not been vested in the Commissioners by the Congress.

The motion for reargument is denied, and the Court will now vacate the stay heretofore granted, and judgment may be entered upon its original decision.

66 MR KORMAN: The judgment is being entered as of today, Your Honor?

THE COURT: Well, it will be entered today, but retirement will take effect as of the date of the application.

MR. KORMAN: I understood that was the effect of Your Honor's ruling before.

THE COURT: I shall let the judgment be entered today; I shall sign it when it is presented to me.

MR. FORD: Your Honor, we have in the record and there is in the file now an order for the entry of judgment, and at that time when I submitted it Your Honor said you would deny it without prejudice.

THE COURT: If it is before me I will sign it.

MR. FORD: Yes, sir, it is in the file.

MR. KORMAN: I have not found my copy of this order which Mr. Ford presented about two weeks ago; may I have an opportunity to look it over before Your Honor signs it?

MR. FORD: I think you have looked it over; you signed it "Seen and objected to."

MR. KORMAN: That is I objected to it at the time because of the fact—

THE COURT: Have you got it before you now?

67 MR. KORMAN: I have it now.

THE COURT: Very well; you may glance at it now, if you wish.

MR. KORMAN: Will Your Honor indulge me just a moment?

THE COURT: Surely.

MR. KORMAN: We have no objection to the form of the order, Your Honor.

THE COURT: I have signed the order vacating the stay.

(Thereupon at 12:05 o'clock p. m. the hearing on the motion was concluded.)

* * * * *

151 ORDER FOR ENTRY OF JUDGMENT

It appearing to the Court that the charges pending against plaintiff before the Trial Board of the Metropolitan Police Department were finally disposed of on September 14, 1953, in accordance with the provisions of Section 4-122, D. C. Code, 1951, it is this 9th day of October, 1953,

ORDERED:

That the stay of entry of judgment as provided in the Order of June 24, 1953, is hereby vacated, and the Clerk is directed to enter forthwith the Order of June 24, 1953, as the Judgment herein.

/s/ Alexander Holtzoff

Judge

* * * * *

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Date	Proceedings	Fees	Total
1953	Deposit for cost by		
Apr. 14	Complaint, appearance. filed		
Apr. 14	Summons, copies (4) and copies (4) of Complaint issued. Served: Nos. 1, 2, 3, 4-15-53 No. 4, 4-16-53.		
Apr. 14	Motion of Pltf., for Preliminary Injunction P&A; MC 4-14-53. Served: Nos. 1, 2, 3, 4-15-53; No. 4, 4-16-53. filed		
Apr. 21	Motion of defts. to dismiss complt. or in the alternative, for Summary Judgment; c/s 4-21-53; Affidavit; Exhibits (2); P & A; App. Vernon E. West, Oliver Gasch & J. H. Baumgartner; M. C. 4-21-53. filed		
Apr. 23	Supplemental affidavit of Robert V. Murray; cert. of service 4-23-53. filed		
Apr. 28	Motion of pltf. to strike or suppress all or portions of affidavit and supplemental affidavit of Robert V. Murray; P & A. filed		
Apr. 28	Affidavit of pltf. in opposition to affidavit of deft. No. 4; c/s 4-28-53. filed		
Apr. 28	Points & Authorities of pltf. in opposition to motion to dismiss, etc.; c/s 4-28-53. filed		
Apr. 30	Affidavit of Robert V. Murray; c/s 4-30-53; Exhibit. filed		
May 1	Supplemental P & A in support of defts'. motion for summary judgment; c/s 5-1-53; Affidavit. filed		
May 4	Opinion denying defts'. motions to dismiss as to Count II, (N) Holtzoff, J.		
May 6	Transcript of Reporter on motion for temporary injunction, etc., April 29, 1953. filed		
May 7	Order denying pltf's motion to strike; granting Motion of defts. to dismiss Count One, and denying motion of defts. for Summary Judgment respecting Count Two,		

and giving defts. ten (10) days from date of entry to file their answer thereto. Holtzoff, J. (N)

May 14 Order denying pltf's motion for preliminary injunction. Holtzoff, J. (N)

May 18 Answer of defts. to complt. filed

May 18 Calendared (N)

May 18 Transcript of proceedings, 5-12-53; Thiel. filed

May 20 Motion of pltf. for summary judgment, served personally; P & A; M.C. 5-20-53. filed

June 1 P & A of defts. in opposition to motion for summary judgment; c/s 6-1-53. filed

June 23 Findings of fact, conclusions of law & order directing defts. to take appropriate action to place pltf. on retirement roll of the Metropolitan Police Dept.; that execution be stayed until the decision of Trial Board. (N) Holtzoff, J.

June 24 Order granting motion of pltf. for summary judgment, provided judgment be stayed until after final disposition of the charges now pending against pltf. before trial board of Metropolitan Police Dep't., etc. Holtzoff, J. (N)

Sept. 14 Notice & motion of defts. for amendment of opinion & entry of Judgment & for modification of order; exhibit A & B; P & A; c/s 9-14-53; M.C. 9-4-53. filed

Sept. 16 Oral motion of pltf. for entry of judgment; heard, argued & denied; (order to be presented). Holtzoff, J.

Sept. 17 Order denying oral motion of pltf. for entry of judgment, without prejudice. Holtzoff, J. (N)

Sept. 21 Points & Authorities of pltf. in opposition to motion for amendment of opinion and entry of judgment and for modification of order; c/m 9-18-53. filed

Oct. 9 Motion of defts' for amendment of opinion & entry of judgment & for modification of order, argued, denied. Holtzoff, J. (N)

Oct. 9 Order vacating stay of entry of judgment of order of 6-24-53 & directing Clerk to enter judgment forthwith; reported by Chloe MacReynolds. Holtzoff, J. (N)

Oct. 14 Notice of appeal of defts. (copy to Charles E. Ford & Joseph Sitnick). filed

Oct. 23 Designation by defts. of record on appeal; c/m 10-23-53. filed

Oct. 23 Statement by defts. of Points on appeal; c/m 10-23-53. filed

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,014

*U. S. Court of Appeals
For the
District of Columbia Circuit*

JAN 15 1954

SAMUEL SPENCER, *et al*, Appellants,

Joseph W. Stewart
CLERK

v.

ALBERT I. BULLOCK, Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

CHARLES E. FORD
JOSEPH SITNICK
Attorneys for Appellee
416 Fifth Street, N. W.
Washington 1, D. C.

QUESTIONS PRESENTED

1. Whether a member of the Metropolitan Police Department who, while such a member, contributed to a retirement fund for over thirty years, and while such a member in good standing and with no charges pending against him, elected to retire from that Department on the basis of age and longevity, can be denied the retirement because of his dismissal from the Department by Trial Board action more than a year after electing to so retire.

II. Whether, under the foregoing circumstances, a court can deny retirement in the absence of any condition or qualification in the statute dealing with the entitlement to the retirement.

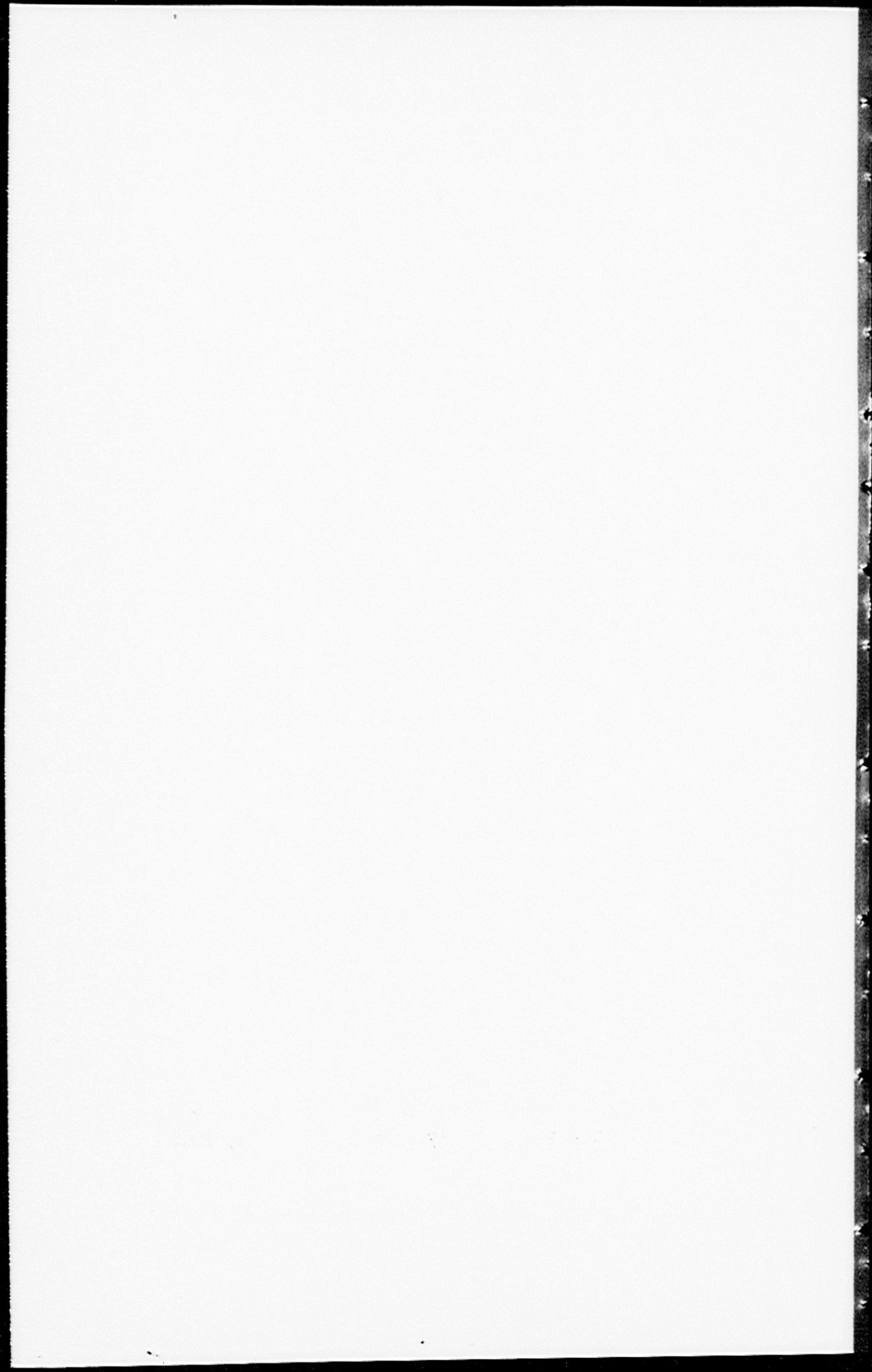
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In The
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,014

SAMUEL SPENCER, RENAH F. CAMALIER, LOUIS W. PRENTISS,
Board of Commissioners, District of Columbia, and
ROBERT V. MURRAY, Chief of Police, Metropolitan Police
Department, *Appellants*,

v.

ALBERT I. BULLOCK, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER STATEMENT OF THE CASE

Appellee was born February 11, 1897, and was appointed to the Metropolitan Police Department on August 17, 1921, and served thereafter continuously as a member of the Department until October 23, 1951, at which time he was suspended from duty without pay. On January 29, 1952,

appellee was restored to duty, having been exonerated of the charges for which he had been suspended and continued on duty as a member of the Department until May 23, 1952, at which time he was again suspended.

Prior to the latter suspension, on February 11, 1952, while on active duty and free of any charges, appellee became eligible for voluntary retirement by virtue of having served for more than twenty-five years in the Department and having attained the age of 55 years, as provided in Section 4-508, D. C. Code (1951 Ed.). On the same date appellee transmitted a written request for retirement to his superior, the appellant Murray. On March 5, 1952, while on active duty and free of any charges, appellee made another written request to the same effect to appellant Murray. No action was taken on either of said requests; and on April 13, 1953, appellee again made written request for retirement.

During the more than thirty years that appellee was a police officer deductions for retirement were made from his salary.

On April 14, 1953, appellee filed a Complaint for Mandatory Injunction against appellants in two counts; the first count praying for an order directing appellants to restore him to duty, and the second count praying for an order directing appellants to forthwith take appropriate action to effect appellee's retirement in accordance with his election and request.

The lower court dismissed count one, and this count is not involved in this appeal. The court entered summary judgment for appellee on the second count, pursuant to an opinion theretofore rendered by it. The entry of the judgment was stayed until disposition of the trial board proceedings which had been filed about two weeks after appellee's complaint was filed in the court below.

The trial board found appellee guilty of violations of sec-

tions of the Metropolitan Police Department Manual, and recommended that appellee be dismissed from the police department. The recommendation was approved by the Commissioners and appellee was ordered by them to be dismissed.

Thereafter the Court vacated the stay and ordered judgment entered directing the retirement of appellee. The appeal is from this judgment.

SUMMARY OF ARGUMENT

The Statute involved (Sec. 4-508) provides that any member of the Metropolitan Police Department who "has served twenty-five years or more as a member of such department * * * and having reached the age of fifty-five years * * * may, at his election, be retired from the service and shall be entitled to receive retirement compensation from the said * * * fund in an amount equal to 50 per centum per annum of the salary received by him at the time of retirement."

The election to retire for longevity is clearly granted to the police officer, and no choice is extended to the Department. The word "may" used in the statute is obviously used to grant the police officer the privilege of making the election.

The right to receive retirement compensation for age and longevity is not conditioned upon the retired officer being subject to recall into active service in time of emergency. The provision for retirement is independent of the Commissioners' right, under another statute, to recall retired officers into active service in times of emergencies.

The Commissioners may not reduce or discontinue retirement compensation except in the instances specified by the statute (Sec. 4-513): conviction of a crime involving

moral turpitude, being a habitual drunkard, or being guilty of lewd or lascivious conduct.

The case of *Rudolph v. Mosheuvel*, 37 App. D. C. 76, supports the contention of the appellee and was correctly applied by the court below to the instant case.

ARGUMENT

I

Appellants discuss and summarize the various statutes which they deem involved in connection with the instant case. These statutes are set out verbatim in appellants' brief and no purpose will be served by appellee also summarizing them.

II

Albert I. Bullock is entitled to receive the retirement compensation provided by Sec. 4-508. This statute is susceptible of but one interpretation, the one given by the lower court:

"The law provides (Sec. 508) that any member of the Metropolitan Police Department who "has served twenty-five years or more as a member of such department . . . and having reached the age of fifty-five years . . . may, *at his election*, be retired from the service and *shall be entitled to receive retirement compensation from the said . . . fund in an amount equal to 50 per centum per annum of the salary received by him at the time of retirement.*"

"In other words, a police officer who has served twenty-five years as a member of the police department and who has reached the age of fifty-five, is accorded the option of retiring and receiving an annuity equal to 50 per cent of the salary received by him at that time. The election to retire for longevity is granted to the police officer. No choice is extended to the Department. It is claimed by the

defendants, however, that the right to retire is not absolute, but that the District of Columbia Government has discretion to grant or deny an application to retire for longevity. Two arguments are advanced in support of this contention. The first is that the word 'may' rather than 'shall' is used in the statute. Obviously, however, the word 'may' is used in order to grant to the police officer eligible to retire the privilege of doing so. He has the choice whether to exercise the right of retiring for longevity. He '*may* retire at his election.' Moreover, the words 'may' and 'shall' are frequently used interchangeably without too great an effort to be precise." (J. A. 18).

But despite the clarity of the language of this statute, appellants quote from the legislative history (Brief of Appellants, p. 32):

"There are no compulsory features in the bill and therefore no hardship will be worked on any man by forcing him out of the service. The measure is purely optional."

The foregoing quotation clearly supports the lower court's view that the option is with the officer only.

Appellants argue that the Police and Firemen's Retiring and Relief Board, created under Section 4-510, is vested with discretion to grant or deny retirement for longevity because it is therein provided that the Board "shall consider all cases for retirement and relief." The Court below answered this contention:

"This conclusion by no means follows. It must be borne in mind that some agency is needed to adjudicate applications for retirement for disability, because at times such applications involve a determination of close and difficult questions of fact. Likewise it is necessary to establish some agency to pass on applications for temporary relief. Doubtless the Board was organized with these considera-

tion in mind. It was also granted jurisdiction over applications for retirement for longevity. In these cases its function is limited and restricted. It is confined to deciding whether the applicant has had the required length of service and has reached the requisite age.

“The mere fact that a Board is established to pass on applications does not give rise to an inference that the Board has discretion to grant or deny applications for reasons not specified in the statute. Its function is to determine whether the applicant for retirement is within the pertinent statutory provisions. If the Board had broad powers not conferred by statute, a question would arise how far its discretion could be carried. For example, could it deny an application for retirement for longevity because of shortage of policemen? Could it deny an application for retirement because the police officer was guilty of some minor infraction of discipline? If the argument of the defendants’ counsel is correct, then the Board would have a right to deny any application for any reason whatsoever so long as it did not act arbitrarily and capriciously. To endow the Board with such authority requires express statutory provisions. None, however, exist. The Congress has not seen fit to include in the statute the terms that the defendants’ counsel would read into it by implication.” (J. A. 19-20).

Appellants next argue, that a policeman does not, upon attaining age and longevity, have an indefeasible right to retirement pay “is made clear by the provisions of Section 4-513.” (This section is set out verbatim in Appellants’ brief, p. 23.) That section provides that the Commissioners, in their discretion, may reduce or discontinue relief granted to any person upon conviction of crime involving moral turpitude, or that such person is an habitual drunkard or is guilty of lewd or lascivious conduct.

Appellants argue (Brief, p. 36) “Surely, if the Commis-

sioners have power to discontinue retirement pay under the conditions set forth in the statute, they have power, in the first instant, to refuse to grant it under the same conditions."

A similar argument was made in the court below, and the following discussion between that court and counsel for appellants clearly demonstrates the absurdity of such an argument (Tr. 62-63).

THE COURT: I know, but the only discretion they have a right to exercise is the discretion that the Congress has reposed in them. My question is, would you say they could go so far as to deprive a police officer, or fireman, of his retirement annuity for a minor infraction of discipline?

MR. KORMAN: Not without some basis or reason. I think then a court would upset it unless it was based on something that does shock the conscience of the Court.

THE COURT: Where in the statute is there any provision that a person forfeits his retirement rights if he is removed from the force on a charge involving moral turpitude, but not if he is removed on minor charges?

MR. KORMAN: I don't think there is any spelling out of that in the statute; it is left to the discretion of those administrators who have to decide that issue.

THE COURT: This is a government of laws and not of men.

MR. KORMAN: True, but this is a government of laws whereby the government sets you up to see that the men who administer these laws do it properly.

THE COURT: And also that they do not exceed the authority conferred upon them by Congress, no matter how well-intentioned they may be.

Appellants next argue that because Section 4-514 gives the Commissioners authority to call into service in time of emergency any retired officer, and it vests the Commissioners with power to enforce this provision by withholding payment of relief, that this provision "manifests an obvious intention on the part of Congress to condition the granting of retirement pay upon subsection to recall into service."

The lower court disposed of this argument, too, in the following colloquy: (Tr. 52-53):

MR. WALKER: For the reasons that I mentioned, Section 514 gives the Commissioners the power to call back into service any retired member; it is obvious, I think, that the Commissioners would not call back any person who had been dismissed from the force.

THE COURT: That is for them to determine.

MR. WALKER: Well, even if they could — —

THE COURT: If he was on the retired list, I presume they would have the power to call him back. Whether they would want to do it or not is something for the Commissioners.

MR. WALKER: I don't think Congress contemplated calling back into active service in the police department — —

THE COURT: The weakness of the District Government's position is that Congress did not provide for a forfeiture of the right to retirement pay for misconduct or for being removed from the force on charges. Of course, I have no doubt that Congress could condition the retirement right in that manner, but the point is they didn't do so.

Appellants argue that *Rudolph v. Mosheuvel*, 37 App. D. C. 76 is "for the most part, inapposite to the one at bar, but to some extent, it supports the appellants contentions."

It is respectfully submitted that legal principles announced in that case support the lower court's rulings in the instant case. Mr. Chief Justice Shepard in his opinion stated:

"The Commissioners could not, by dismissing him on charges made thereafter, deprive him of the bounty provided by law, which they had no power to suspend." (p. 82) and further (p. 82)

"We agree with the learned trial justice that the right of the relator to retirement on a pension under the terms of the law were fixed at the time that he received his injuries . . ."

It is submitted that under the terms of the statute (4-508), and the foregoing principles announced in the quoted language from the Mosheuvel case, appellee's right to retirement became fixed when he attained the age, longevity, and made application for retirement.

Appellee has not been convicted of any offense, or been shown to be guilty of any conduct for which the Congress has given the Commissioners authority to "reduce or discontinue" retirement pay. Certainly, no statute has given them authority to withhold the retirement because of a finding by a trial board of infraction of disciplinary regulations, more than a year after the right to retire had been asserted. The lower court, in an opinion on appellant's motion (J.A. 33-34) stated):

"Congress fixed the terms upon which a police officer and a fireman is entitled to be retired. The retirement scheme is a contributory plan and results in vested rights being created in the members of the plan or scheme. Congress has provided the terms on which members of the two forces are entitled to retirement annuities, *and it did not provide that the retirement annuity shall be forfeited if the member of the force who is otherwise entitled to retirement has been guilty of misconduct.* I have no reason to doubt that Congress did have the

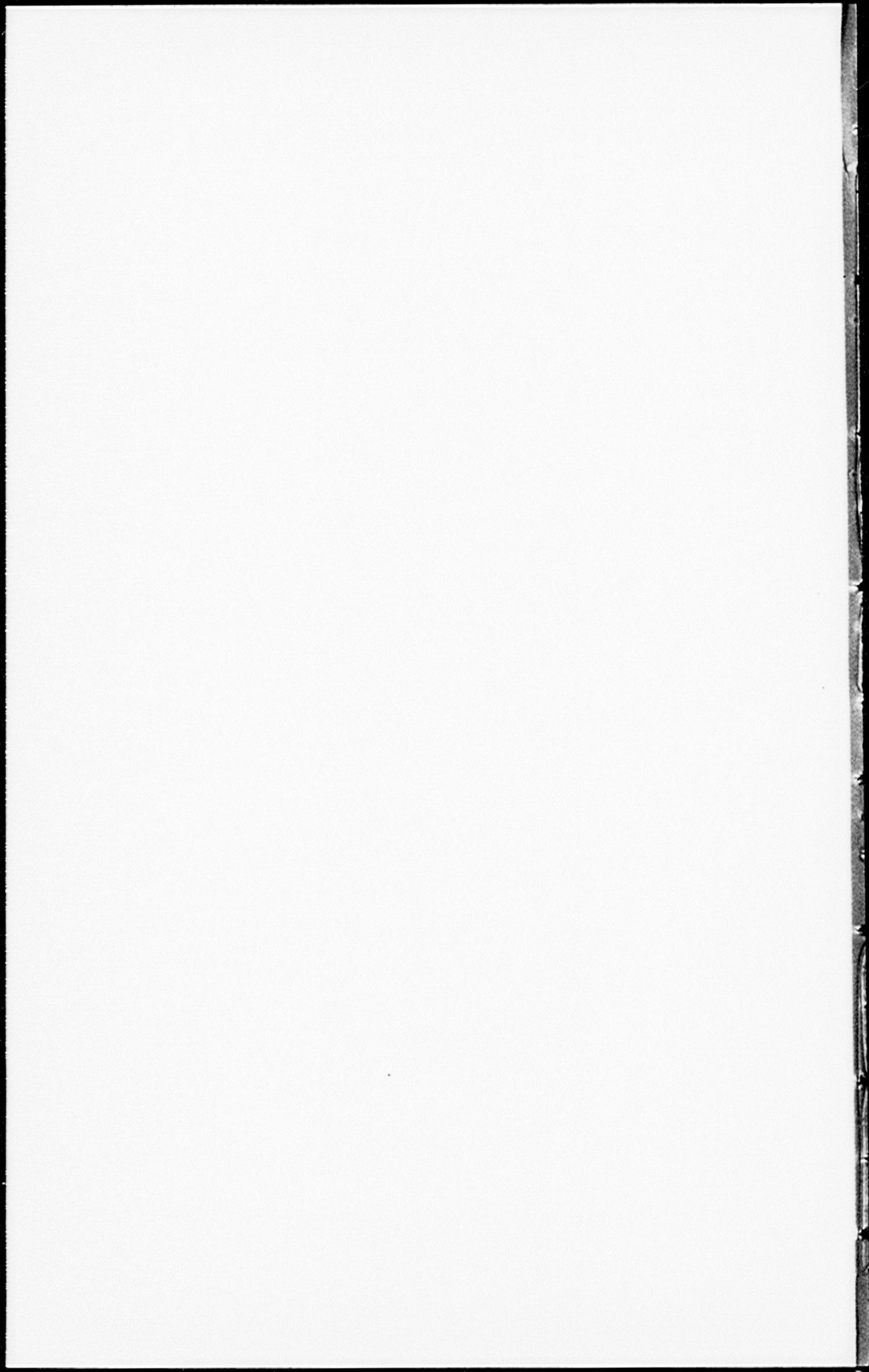
power so to provide. Such a provision then would become part of the terms of the retirement plan. *I do not feel, however, that the Court has a right to read into the statute something that Congress did not insert in it, nor do I feel that any discretion is granted to the Commissioners to deprive a person of his retirement rights for reasons that the Commissioners consider valid. That discretion has not been vested in the Commissioners by the Congress.* (Emphasis supplied.)

CONCLUSION

It is respectfully submitted that the judgment of the District Court was right and should be affirmed.

Respectfully submitted,

CHARLES E. FORD,
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FILED OCT 21 1954

Joseph W. Stewart
CLERK

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,014

SAMUEL SPENCER, ET AL., *Appellants*,

v.

ALBERT I. BULLOCK, *Appellee*.

PETITION FOR REHEARING EN BANC

Samuel Spencer, Renah F. Camalier and Louis W. Prentiss, Commissioners of the District of Columbia, and Robert V. Murray, Chief of Police, Metropolitan Police Department, appellants in the above-entitled case, petition the Court for a rehearing of said case before the full complement of the Court, sitting en banc, and as grounds therefor state as follows:

The appellee (hereinafter referred to as "Bullock") was, prior to his dismissal from the Metropolitan Police Department on September 14, 1953, a police inspector (App. 5, 31, 32). During the period from October 23, 1951 to January 29, 1952, Bullock was suspended from the police department because of a conspiracy indictment (App. 5).

On January 29, 1952, the United States District Court for the District of Columbia, upon motion of Bullock, directed a verdict of his acquittal on the conspiracy charges (App. 5). On that same day, January 29, 1952, Bullock was "tentatively restored to duty" (App. 6).

On February 11, 1952, Bullock made the first of three applications for retirement (App. 3). As was hereinbefore stated, prior to the time of his request for retirement on February 11, 1952, Bullock had been "tentatively restored to duty" (App. 6). Prior to that date, the subcommittee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia had commenced hearings and Bullock was one of the members of the police department who was called upon to give testimony before the subcommittee as to his sources of income (App. 5). Bullock testified before the subcommittee on May 21 and 22, 1952 (App. 10, 11), but he failed to explain the sources of his income (App. 5). Prior also to the date of Bullock's first application for retirement, the Commissioners of the District of Columbia had requested the Bar Association of the District of Columbia to appoint a committee to study Bullock's testimony before the Grand Jury (App. 6). Such a committee was appointed on February 11, 1952, but Bullock's testimony was not made available to the committee until March 11, 1952 (App. 12).

On March 5, 1952, Bullock made a second application for retirement (App. 6).

It is clear therefore, that Bullock's first two applications for retirement came prior to the time when the Bar Association committee had the opportunity to study his testimony before the Grand Jury and prior to Bullock's testimony before the Senate subcommittee.

On May 23, 1953, the appellant Murray, Chief of Police, completed a study of the testimony of Bullock before the subcommittee and immediately called upon Bullock for an

explanation of the source of his unexplained income as brought out in the testimony before the subcommittee. Bullock informed the Chief that he was unable at the time to give an explanation but that his attorney had retained the services of a certified public accountant to go over his deposits and withdrawals from his bank account. The Chief of Police gave Bullock every reasonable opportunity to explain the source of his unexplained income before suspending him on May 23, 1952 (App. 6, 7). On April 23, 1953, Bullock filed the third of his applications for retirement. *The third application for retirement came, as Bullock concedes, while he was in the suspended status* (App. 13).

On August 31, 1953, a police trial board found that Bullock (1) had failed to file required District of Columbia income tax returns for 1946, 1947 and 1948 (App. 28), (2) had refused to obey an order of the Chief of Police to explain the source from which he received certain sums of money over and above that received by him as a member of the police force, and (3) having been called as a witness, and being confronted with evidence tending to show the receipts by him and subsequent deposit of certain sums of money over and above that received by him as a member of the police force, did fail and neglect to explain such income to the members of the Subcommittee of the United States Senate Committee Investigating Crime and Law Enforcement in the District of Columbia (App. 29). On September 14, 1953, the Commissioners of the District of Columbia affirmed the findings of the trial board, dismissed Bullock from the Metropolitan Police Department, ordered that the deductions from Bullock's salary with the police department for the benefit of the retirement fund be returned to him, and did not act directly upon Bullock's application for retirement (App. 31, 32).

Bullock filed a complaint in the lower court for a mandatory injunction directing appellants to restore him to duty and to take appropriate action to effect his retirement (App.

1-4). The lower court held that Bullock was entitled to retirement compensation and that the Commissioners of the District of Columbia had no discretion in the matter (App. 15-22). The appellants took an appeal to this Court.

The case came on for oral argument in this Court on April 21, 1954, before Circuit Judges Edgerton, Wilbur K. Miller and Fahy. On October 7, 1954, in an opinion written by Circuit Judge Edgerton and concurred in by Circuit Judge Wilbur K. Miller, this Court affirmed the judgment of the lower court. Circuit Judge Fahy dissented and wrote a lengthy and well-considered statement of his reasoning and his conclusions.

It is obvious that the case at bar is of utmost importance. The lower court recognized its importance. After characterizing the charges against Bullock as "grave and serious" the trial court stated that:

"* * * Refusal by a Government officer or employee to disclose to proper authority sources of outside income can hardly be treated with indifference. *For obvious reasons, the public has an interest in this matter.* This is especially true in the case of law enforcement officers. If the income is honestly derived no reason is perceived why this fact should not be revealed to a superior officer or to a Congressional Committee. Concealment naturally arouses suspicion. At times it leads to an unfavorable inference. It is not unreasonable to assume that resort would not be had to concealment unless there was something to conceal. Similarly, failure to file income tax returns may be a criminal offense. Manifestly the charges should be tried. It is entirely proper, in fact desirable, to suspend the plaintiff from duty until a final disposition is reached in respect to them." (Italics supplied, App. 16, 17.)

Notwithstanding its recognition of the seriousness of the charges against Bullock, the lower court held him entitled

to retirement compensation even though the court was aware that Bullock had been dismissed from the police department (Tr. 45, 46, 54).

In its opinion entered October 7, 1954, this Court also held Bullock to be entitled to retirement compensation even though it recognized the fact that "*the plaintiff appears to have behaved ill*" and was aware that "the defendant Commissioners dismissed him from the police department September 14, 1953".

The appellants submit that this Court should grant a rehearing before all its members because:

(1) The opinion and judgment of October 7, 1954 is predicated upon an erroneous interpretation of a statute of far-reaching import which has not been, but should be, interpreted by the full Court;

(2) The general public of the District of Columbia has a vital interest in the proper resolution of the issues presented;

(3) The opinion and judgment as rendered constitutes a precedent from which dire consequences may result; and

(4) The morale and efficiency of the Metropolitan Police Department of the District of Columbia will be seriously and adversely affected by the opinion and judgment hereinbefore entered.

Judge Fahy in his 7-page dissenting opinion has, appellants submit, correctly interpreted the statutes involved. As Judge Fahy stated in his opinion, "Prior to 1940 there were three statutory retirement categories, under none of which could appellee have been retired due to being at least 55 years of age, though not yet 60, with at least 25 years service." Discussing these three categories, Judge Fahy said that the first, which provides for retirement for permanent disability through injury or disease incurred in the line of duty (Sec. 4-507, D. C. Code, 1951) "leaves no discretion in the Commissioners" since it declares that the

officer "shall * * * be retired". As he pointed out, the second category, which provides for retirement for permanent incapacity due to any cause upon written application for retirement approved by the Commissioners where the applicant is 55 years of age and has 25 years of service (Sec. 4-507, D. C. Code, 1951), also provides that the officer "shall * * * be retired", though his application must be approved by the Commissioners. He said that such approval presumably must be given if the conditions specified are met and that, therefore, no discretion resides in the Commissioners. As to the third category, which provides for retirement upon reaching 60 years of age (Sec. 4-507, D. C. Code, 1951), Judge Fahy pointed out that the officer shall be retired "in the discretion of said Commissioners". The Congress has expressly repealed none of these provisions.

Sec. 4-508, D. C. Code, 1951, upon which the appellee relies, was added in 1940. That section provides that:

"Whenever any member of the Metropolitan police department of the District of Columbia * * * has served twenty-five years or more as a member of such department * * * and having reached the age of fifty-five years, he may, at his election, be retired from the service * * * and shall be entitled to receive retirement compensation from the * * * policemen and firemen's relief fund, District of Columbia, in an amount equal to 50 per centum per annum of the salary received by him at the date of retirement * * *"

As is apparent from both the opinion of the Court and the dissenting opinion of Judge Fahy, the critical question in this case is whether Sec. 4-508 "leaves to the Commissioners any discretion, as in the third category above mentioned, or confers upon the officer an absolute right to retirement as in the first and perhaps second categories, both of which, however, apply only when the officer is incapacitated".

In the majority opinion it is stated, *inter alia*, as follows:

"The words 'may, at his election, be retired' are equivalent to 'may elect to be retired'. Since Congress was offering an 'election' it said *may* and not *shall*. To say that a policeman may at his election be retired is not to say that after he has made his election the Commissioners may, at their election, refuse to retire him."

The appellants contend that the foregoing interpretation of the statute is erroneous. If the Congress had intended the result reached by the majority, it would have used such language which would make it clear that retirement is mandatory upon request. Thus, Congress could have, if it had intended that result, used the phrase "may, at his election retire". Since the language the Congress did use is in the passive voice, "be retired", it seems certain that retirement under the 1940 Act is not automatic. An examination of the legislative history of the Act of October 14, 1940 reveals the underlying use of that language. The purpose was to prevent any officer from being forced, against his will, out of the service.¹

The practical effect of the holding of the Court was described in the dissenting opinion in the following words: "Charges, however grave, which have not yet eventuated in suspension or dismissal, though under investigation, must be disregarded" in acting upon the application of any police officer 55 years of age with 25 years of service. As Judge Fahy also pointed out, "The need, at the time the application is made, for retention in service for a while longer of all able-bodied officers 55 years of age with 25 years service, must be disregarded".

To the observations of Judge Fahy of some of the practical results of the Court's interpretation of the statute, these appellants add that under the ruling of the Court it is

¹ See Report No. 1987 to accompany H. R. 8846, 76th Congress, 3d Session.

possible that a police officer, 55 years of age with 25 years of service, could on any given day flout his superiors and disregard all orders and later that same day become entitled to retirement compensation for life by the simple expedient of filing an application therefor. Surely the Congress never intended any such result. Nor, appellants submit, did the Congress use any language which compels or permits any such interpretation.

Indeed, it appears that, although alluded to in neither the majority opinion nor the dissent, the Congress had exactly the opposite intention, as shown by the provisions of Sec. 4-514, D. C. Code, 1951. Therein it is provided that retired policemen may be called back into the public service in certain emergencies. The majority ruling herein would make Bullock the recipient for life of a large annuity without the concomitant responsibility of serving his benefactor in emergencies because, obviously, an inspector of police who betrayed his trust when on active duty could never be called upon to command loyal policemen in the future.

Judge Fahy is of opinion that the 1940 Act, when considered in its place in the whole plan of retirement, as well as its permissive language, added "a discretionary fourth category, without repealing any previously existing provision". Appellants submit that the statutes, as parts of a whole scheme of retirement, are correctly construed in the dissenting opinion for the reasons therein pointed out.

As Judge Fahy so correctly reasoned, in order for the Court to reach the conclusion it did, it was inherently necessary that the Court indulge in repeal by implication, a practice which the law does not favor when it infers a legislative intent inconsistent with that which has been expressed.

In summary, appellants submit that when a high-ranking police officer, such as Bullock, refuses to disclose to either the Chief of Police or a Committee of the Senate of the

United States the source of that portion of his income over and above his salary as a police officer and, in addition, fails to file required income tax returns for 3 years, such an officer is not entitled to a life annuity and the statute does not require that he be granted the same.

The opinion and judgment of this Court entered October 7, 1954 is erroneous and the appeal should therefore be set down for a rehearing before all the members of this Court sitting en banc.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing
is presented in good faith and not for any purpose of delay.

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